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CASES

ON

CRIMINAL PROCEDURE

(ABRIDGED EDITION)

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

WILLIAM E. MIKELL, B. S.

PROFESSOR OF LAW IN THE UNIVERSITY OF PENNSYLVANIA

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT
GENERAL EDITOR

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To

WILLIAM DRAPER LEWIS, B.S., LL.B., PH.D.

who during many years of close association has been a constant friend,
a helpful critic, and an inspiring colleague

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THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence

of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limi-

tations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published books on the following subjects:

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It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

WILLIAM R. VANCE,
General Editor.

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CASES ON CRIMINAL PROCEDURE

(ABRIDGED EDITION)

CHAPTER I

JURISDICTION AND VENUE

If two of the king's subjects go over into a foreign realm and fight there, and the one kill the other, this murder, being done out of the realm, cannot be for want of trial heard and determined before the common law. * * * If A. give B. a mortal wound in a foreign country, B. cometh into England and dieth, this cannot be tried by the common law, because the stroke was given there, where no visne can come.[1] * * * If a man be stricken upon the high sea and dieth of the same stroke upon the land, this cannot be enquired of by the common law, because no visne can come from the place where the stroke was given (though it were within the sea pertaining to the realm of England, and within the ligance of the king).[2] * * * And before the making of the statute of 2 Edw. VI, if a man had been feloniously stricken, or poisoned in one county, and after had died in another county, no sufficient indictment could thereof have been taken in either of the said counties, because, by the law of the realm the jurors of one county could not enquire of that which was done in another county.[3] It is provided by that act that the indictment may be taken, and the appeal brought in that county, where the death doth happen.

3 Coke, Inst. 48.

[1] Compare Commonwealth v. Kunzmann, 41 Pa. 429 (1862); Hanks v. State, 13 Tex. App. 289 (1882); Rex v. Russell, 20 Cox, C. C. 51 (1901); State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130 (1892).

[2] It is provided by Rev. St. U. S. § 730 (U. S. Comp. St. 1901, p. 585), that in such case the courts of the district into which the offender is first brought shall have jurisdiction. St. 2 Geo. II, c. 21, provided that when the stroke is given in England and the death occurs out of England, or the reverse, the homicide may be inquired of in that part of England where either the death occurred or the stroke was given. The present statute, similar in its provisions, is St. 24 & 25 Vict. c. 100, § 10.

[3] Hale says (page 426): "It was *doubtful* whether he were indictable or triable in either, but the more common opinion was, that he might be indicted where the stroke was given." See Year Book, 7 Hen. VII, p. 8.

SIMPSON v. STATE.

(Supreme Court of Georgia, 1893. 92 Ga. 41, 17 S. E. 984.)

Indictment for assault to murder.

LUMPKIN, J.[4] * * * Under the evidence introduced in behalf of the state, and which the jury evidently believed to be true, the accused shot twice at the prosecutor, intending the balls from the pistol used to take effect upon him. At the time of the firing the prosecutor was in a boat upon the Savannah river, and within the state of Georgia, and the accused was standing upon the bank of the river in the state of South Carolina. It was conceded that if either or both of the balls had struck the prosecutor an offense of some kind would have been committed in Georgia, upon the idea that the act of the accused took effect in this state; but it was contended that, inasmuch as the prosecutor was not struck, no effect whatever was produced in Georgia by the act in question.

This contention is not well founded in point of fact, for the evidence shows conclusively that, although the prosecutor was not injured, the balls did strike the water of the river in close proximity to him, within this state, and therefore it is certain that they took effect in Georgia, although not the precise effect intended, assuming that the verdict correctly finds it was the deliberate purpose of the accused to actually shoot at the prosecutor. What the accused did was a criminal act, and it did take effect in this state. Mr. Bishop says: "The law deems that a crime is committed in the place where the criminal act takes effect. Hence, in many circumstances, one becomes liable to punishment in a particular jurisdiction while his personal presence is elsewhere. Even in this way he may commit an offense against a state or county upon whose soil he never set his foot." 1 Bish. Crim. Proc. § 53. And see Bish. Crim. Law, § 110.

Of course, the presence of the accused within this state is essential to make his act one which is done in this state, but the presence need not be actual. It may be constructive. The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. Thus, a burglary may be committed by inserting into a building a hook or other contrivance by means of which goods are withdrawn therefrom; and there can be no doubt that, under these circumstances, the burglar, in legal contemplation, enters the building. So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this state, the mere fact of missing would not render the person who shot any the less guilty. Consequently, if one shooting

[4] Part of this case is omitted.

from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle. * * *

In Adams v. People, 1 N. Y. 173, it appeared that the accused forged a paper in Ohio, upon which he procured money in New York, through an innocent agent, without going into the latter state. He afterwards voluntarily went into that state, and was indicted and tried for the crime. It was conceded by both court and counsel that he was guilty of committing the crime in the state of New York, and the question upon which the case turned was simply whether or not, inasmuch as he owed no allegiance to that state, he could be tried and punished therein. In U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, it appeared that a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles, by which a person on a schooner belonging to the natives, and lying in the same harbor, was killed; and it was held that the act, in contemplation of law, was done on board the foreign schooner, where the shot took effect, and that jurisdiction of the crime belonged to the foreign government, and not to the courts of the United States.

In Hawes on Jurisdiction (section 110) it is laid down that "a crime may be committed within the jurisdiction of a state, although the person committing it never was within its borders, if the act takes effect there." An interesting discussion pertinent to the question involved may be found in 6 Crim. Law Mag., beginning on page 155, in an article entitled "Dynamiting and Extraterritorial Crime." "A party who, in one jurisdiction, or in one county, may put in operation a force that does harm in another, may be liable in either for the offense." Brown, Jur. § 92. This section also contains numerous illustrations which are apt and pertinent. See, also, Reg. v. Rogers, 14 Cox, Cr. Cas. 22.

The above authorities demonstrate beyond question that a criminal act begun in one state and completed in another renders the person who does the act liable to indictment in the latter. In view of these authorities, there cannot in the present case be any doubt whatever that Simpson would have been indictable in Georgia if a ball from his pistol had actually wounded Sadler. That this would be true is too well established for serious controversy. The able and zealous counsel for the plaintiff in error candidly conceded that such would be the law, but contended that, as the balls "took no effect in Georgia," the entire act of the accused was committed in South Carolina, and that he really did nothing in this state.

We have endeavored to show that this contention is not sound. As we have already stated, the act of the accused did take effect in this state. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was, therefore, in a legal sense, after the ball crossed the state line, up to the moment that it stopped, in Georgia. It is entirely immaterial that the object for which he crossed the line failed of accomplishment. It hav-

ing been established by abundant authority and precedent that in crime there may be a constructive as well as an actual presence, there can be, in a case of this kind, in which the act of the accused, when analyzed, is simply an attempt to unlawfully wound another by shooting, no rational distinction in principle, as to the question of jurisdiction, whether the attempt is successful or not. The criminality was complete, and the offense was perpetrated in Georgia, irrespective of results. * * *

Judgment affirmed.[5]

ROBBINS v. STATE.

(Supreme Court of Ohio, 1857. 8 Ohio St. 131.)

BARTLEY, C. J.[6] * * * The court was asked to instruct the jury that, to convict under this indictment, it must be proven that the offense was committed in Marion county, and that, if the accused gave the poison into the hands of the deceased in Shelby county, and she did not swallow it there, but carried it with her into Marion county, and there swallowed it, and became poisoned, the crime was committed, if committed at all, in Shelby, and not in Marion, county. The court refused to give this instruction, as asked, but did charge the jury that, before finding a verdict of guilty, they must be satisfied,

[5] Accord: State v. Hall, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822 (1894), where the court refused jurisdiction of defendant, who, standing in North Carolina, shot a person in Tennessee.

There being no common law of the United States as to crimes (see U. S. v. Coolidge, 1 Wheat. 415, 4 L. Ed. 124 [1816]; U. S. v. Worrall, 2 Dall. 384, 1 L. Ed. 426 [1798]), the federal courts have no jurisdiction to punish an act, unless such act is made a crime by the Constitution or by act of Congress. Congress has from time to time, under the power given it by the Constitution to create, define, and punish offenses whenever they shall deem it necessary for effectuating the objects of the government, enacted statutes punishing crimes against the United States and providing for the proper venue. If such statutes do not expressly or by implication make the crime exclusively cognizable in a federal court, and the same criminal act is also punishable by the laws of the state, the state in which the act was done has concurrent jurisdiction over the offense. Moore v. Illinois, 14 How. 13, 14 L. Ed. 306 (1843).

See, for jurisdiction of the United States Court for China, Biddle v. United States, 156 Fed. 759, 84 C. C. A. 415 (1907).

Const. art. 1, § 8, cl. 17, gives the right of exclusive legislation to the United States, to exercise authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. The federal courts have, therefore, exclusive jurisdiction over all crimes committed in such places, so purchased, in the absence of an express reservation of jurisdiction by the state Legislature (United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867 [1819]), or in lands ceded by a state to the United States without reservation of jurisdiction (United States v. Carter [C. C.] 84 Fed. 622 [1897]). But the purchase of such lands, without the consent of the state in whose territory they are, does not give the federal court jurisdiction over crimes committed in such lands. United States v. Penn (C. C.) 48 Fed. 669 (1880). And see In re O'Connor, 37 Wis. 379, 19 Am. Rep. 765 (1875).

[6] Part of this case is omitted.

from the proof, that the accused committed the act in Marion county, but that it was not necessary that they should find that he had been in Marion county, or had given the poison into the hands of the deceased in that county. It would be sufficient, to justify a conviction, if they found that the accused had furnished the poison to Nancy Holly in Shelby county, and that, before swallowing it, she had taken it with her and went into the county of Marion, and there swallowed the poison and died. * * *

It is insisted that the accused had not been in Marion county, and that a person could not commit a crime in a county in which he had not been. Ordinarily this would be true, but it is not necessarily so. A person may commit a criminal act in a county, although he has never stepped a foot within its limits. If a person in Morrow county, near the line of Marion county, should, by firing a gun or hurling a bludgeon across the county line, unlawfully kill a person in Marion county, he might be guilty of a crime, and be amenable to a prosecution in the latter county, although he had never been within its limits.

There does not appear, therefore, to have been any error in the charge of the court on this point.

HASKINS v. PEOPLE.

(Court of Appeals of New York, 1857. 16 N. Y. 344.)

The prisoner was indicted, with four other persons, for grand larceny; the property alleged to have been stolen being money and bank notes, the property of David J. Shaw.

DENIO, C. J.[7] * * * As the stolen money was brought by the thieves into the county of Onondaga, the prisoner was legally indicted in that county. This has been the settled law from an early period. 3 Inst. 113; 1 Hale's P. C. 507; People v. Gardner, 2 Johns. 477. Even if the original taking had been in another state or country, and the felon had brought the stolen property into this state, he could now be indicted in any county into or through which he carried it. 2 Rev. St. 698, § 4; People v. Burke, 11 Wend. 129. No distinction arises out of the fact that a burglary was committed where the property was stolen, in Cayuga county. Burglary, when accompanied with larceny, is a compound offense. Under a count for the burglary the prisoner may be convicted of a simple larceny. At the common law the burglary could only have been prosecuted in the county where it was committed; but when accompanied with larceny the latter could be prosecuted in any county into which the prisoner took the stolen property. The same is true of robbery or other compound offenses.

The principle is well illustrated in the following passage from Hale: "A. robs B. on the highway, in the county of C., of goods of

[7] Part of this case is omitted.

only the value of twelve pence, and carries them into the county of D. It is certain that this is larceny in the county of D., as well as in the county of C.; but it is only robbery in the county of C., where the first taking was, and for robbery he cannot be indicted or apprehended in the county of D., but only in the county of C. But he may be indicted of larceny in the county of D., though the robbery were but of the value of one penny; yet if A. were indicted thereof in the county of C., he should have had judgment of death and been excluded from clergy." 1 Hale's P. C. 536. In these cases the indictment takes no notice of the county where the first taking was, the theory being that the legal possession of the goods remains in the true owner, and every moment's continuation of the trespass and felony amounts to a new caption and asportation. 1 Russ. on Crimes, 173; 2 Hale, 163; 1 Hawk. P. C. c. 33, § 52; 4 Bl. Com. 304; 2 East, P. C. 771, c. 16, § 156. The idea that, in cases of this description, the crime is considered as actually committed in the county where the offender is found with the goods, is very distinctly carried out in the case of Rex v. Parker, 1 Russ. 174. An indictment was found in Hertfordshire for stealing four live tame turkeys, and it appeared that they were stolen alive in Cambridgeshire, killed there, and carried dead into Hertfordshire; and, upon the point being heard, the judges held that, though the carrying into Hertfordshire constituted a larceny, yet it was a new larceny there, and a larceny of dead turkeys, and not of live ones.

It was unnecessary, and I think it would have been erroneous, to have set out in the indictment the offense in Cayuga county. The courts in Onondaga county had no jurisdiction of that transaction, as a distinct offense. It was simply matter of evidence, to characterize what was done in Onondaga, and to show the quality of that act.

The prisoner might, under the statute, have been indicted in Onondaga for the burglary committed in Cayuga. 2 Rev. St. 727, § 50. In such a case, I think the indictment must have been special. The burglarious entry could not have been charged to have been made in Onondaga without a variance; and if it had stated it to have been made in Cayuga, according to the fact, without a statement that the property had been brought into Onondaga, it would have appeared that the courts of the latter county had no jurisdiction to try the offense.

The difference between the two cases is this: Burglaries may be tried out of their proper counties in certain special cases; that is, where the goods burglariously taken are carried into another county by the offenders. But this is by positive law, and not because the burglary was actually committed in the county where the indictment is found, or in judgment of law is considered to have been committed there. The fact must therefore be set out which brings the case within the statute; but in the case of an indictment for a simple larceny, found in a county into which the thief has carried the property stolen in another county, the law adjudges that the offense was in truth com-

mitted there, and hence there is no occasion for a statement in the pleading of what occurred in the other county. * * *

Judgment affirmed.[8]

REGINA v. ROGERS.

(Court of Criminal Appeal, 1877. 14 Cox, Cr. Cas. 22.)

Case stated for the opinion of this court by the assistant judge of the Middlesex sessions.

At a general sessions of the peace for the county of Middlesex held at the Guildhall, Westminster, on the 7th day of June, 1877, the prisoner was tried on an indictment which charged him with having, when he was employed in the capacity of clerk or servant to Middleton Chapman and another, embezzled the sum of £10. 17s. 6d. received by him on their account.[9] * * *

FIELD, J. I also am of opinion that this conviction should be affirmed, and I have come to this conclusion on the ground that a material part of the offense was committed in the county of Middlesex. It was not the duty of the prisoner to remit the specific money which he had received, but it was his duty to remit that money or its equivalent at once to his employers; i. e., in the course of the week in which he received it. On the 18th day of April the prisoner received the money in question at York, and on the 19th and 20th the prisoner was at Hull, and wrote letters to his employers in London, saying nothing about the receipt of the money at York. Again on the 21st, when at Doncaster, he wrote a letter to his employers in London; and, in answer to a question left to them, the jury say that the prisoner intended that the prosecutors should understand from the statements in that letter that he had not then received the amount in question, and the prisoner had thus in effect rendered a willfully false account. Upon these facts the question arises whether any material part of this offense was committed in the county of Middlesex?

Starting with this, that the law presumes every man to be innocent till he is proved to be guilty, I am at a loss to find any evidence of the complete offense of embezzlement in Yorkshire, except the writing and posting there of the letters addressed to the prisoner's employers in Middlesex. On the authority of Evans v. Nicholson, 45 L. J. C. P. 111, note 4, which decided that a letter, in which the defendant admitted a debt and promised to pay it, addressed to and received by the plaintiff in the city of London, was evidence of an account stated

[8] In State v. McGraw, 87 Mo. 161 (1885), it was held that a law was unconstitutional which authorized a prosecution for burglary in a county other than that in which the burglary was committed, into which the goods acquired by the burglary were taken.

[9] Part of this case is omitted.

in the city of London, I think that the letter of the 21st day of April, addressed to and received by the prosecutors, and intended to act on their minds, in Middlesex, was in effect an act done by the prisoner in Middlesex. The case to my mind is the same as if a man standing in one county with a long spear or a pistol kills or injures a man in the adjoining county, or as if a man with one leg in one county and one in another does a criminal act. So as to a letter posted in one county and received in another. There may have been evidence on which the prisoner might have been properly convicted in Yorkshire; but I am clearly of opinion that there was evidence which justified his conviction in Middlesex.

In Rex v. Burdett, 4 B. & Ald. 95, which has been followed universally, the libel was contained in a letter written in county L., but received in county M., and it was held that the defendant might be indicted in either county. The case of Rex v. Taylor, 3 Bos. & Pul. 596, also makes the matter very plain. In that case the prosecutor's servant received 10s. for him in the county of Surrey, after which the same evening he returned to his master, in the county of Middlesex, who asked him if he had brought the money, and the prisoner said he had not, and that it had not been paid to him; and it was held that he was properly indicted in the county of Middlesex. Lord Alvanley, C. J., said: "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money was ever embezzled until the prisoner was in the county of Middlesex. * * * In such a case as this, even if there had been evidence of the prisoner having spent the money in Surrey, it would not necessarily confine the trial of the offense to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he was called upon by his master to account."

The act of nonaccounting is a continuing act, and extended in the present case to the time of the receipt of the prisoner's letter of the 21st day of April in the county of Middlesex. That was the first act from which it is possible to say with certainty that the prisoner intended to embezzle the money. Maule, J., put the matter in much the same way in Reg. v. Murdock [5 Cox, Cr. Cas. 362]: "It appears to me that there was evidence to go to the jury that the offense was committed when the prisoner met his master in Nottingham, and, being asked by him for the money, did not pay over the amount." I think, therefore, that the conviction should be affirmed.

Conviction affirmed.[10]

[10] Kelly, C. B., and Lindley and Manisty, JJ., delivered concurring opinions, and Huddleston, B., a dissenting opinion.

By statute in some states embezzlement is indictable in any county into which the accused carries the property. See Pen. Code Cal., § 786; People v. Garcia, 25 Cal. 531 (1864); Brown v. State, 23 Tex. App. 214, 4 S. W. 588 (1887); Code Cr. Proc. Tex., art. 219.

At common law the receiver of stolen goods can be prosecuted only in the

If a man were accessory before or after the fact in another county than where the principal felony was committed, at common law it was dispunishable, but now by the statute of 2 & 3 Edw. VI., c. 24, the accessory is indictable in that county where he was an accessory, and shall be tried there, as if the felony had been committed in the same county.

1 Hale, P. C. 623.

county where the goods were first received as stolen goods. Roach v. State, 5 Cold. (Tenn.) 39 (1867).

By statute in England, and in some states, the receiver of stolen goods may be prosecuted either in the county in which he first received the goods or in any county in which he at any time thereafter had them. 2 Russ. Cr. 238. See Wills v. People, 3 Parker, Cr. R. (N. Y.) 473 (1857); Moseley v. State, 36 Tex. Cr. R. 578, 37 S. W. 736, 38 S. W. 197 (1896). In the absence of a statute, the offense of obtaining goods by false pretense can be prosecuted only in the county where the goods were first obtained, not in the county where the false pretense was made. (Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126 [1892]; Rex v. Buttery, cited in Reg. v. Ellis, [1899] 1 Q. B. 235); nor in a county into which the goods are afterwards carried (Reg. v. Stanbury, 9 Cox, C. C. 94 [1862]).

The proper venue in forgery is the county where the act of making or altering the instrument was done. Commonwealth v. Parmenter, 5 Pick. (Mass.) 279 (1827). And in uttering a forged instrument, the county in which the instrument was uttered. People v. Rathbun, 21 Wend. (N. Y.) 509 (1839). Where the forged instrument is sent by mail from the county where it was forged to another county where it is used to defraud, the weight of authority is that the proper venue of the uttering is the latter county, in the absence of a statute to the contrary (People v. Rathbun, 21 Wend. [N. Y.] 509 [1839]; State v. Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775 [1893]), though some authorities are to the effect that the offense may be tried in the county where the letter was mailed (Perkin's Case, 2 Lewin, 150 [1826]).

For the venue in libel at common law and under statutes, see Commonwealth v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214 (1825); Rex v. Burdett, 4 B. & Ald. 95 (1820); U. S. v. Smith (D. C.) 173 Fed. 227 (1909). In bigamy: People v. Mosher, 2 Parker, Cr. R. (N. Y.) 195 (1855); Houser v. People, 46 Barb. (N. Y.) 33 (1866); State v. Hughes, 58 Iowa, 165, 11 N. W. 706 (1882); State v. Smiley, 98 Mo. 605, 12 S. W. 247 (1889). In attempts: Griffin v. State, 26 Ga. 493 (1858). Cf. State v. Terry, 109 Mo. 601, 19 S. W. 206 (1891). Robbery: Sweat v. State, 90 Ga. 315, 17 S. E. 273 (1892).

By St. 7 Geo. IV, c. 64, § 12 (1826), it is provided that, where any felony or misdemeanor shall be begun in one county and completed in another, it may be dealt with in any of the said counties in the same manner as if it had been actually and wholly committed therein. Similar statutes have been enacted in the United States. See Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126 (1892). Section 134 of the Code of Criminal Procedure of New York provides: "When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county." See People v. Mitchell, 49 App. Div. 531, 63 N. Y. Supp. 522 (1900). Affirmed in 168 N. Y. 604, 61 N. E. 182 (1901).

The Constitution of the United States provides as to crimes against the United States: "The trial of all crimes * * * shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." Article 3, § 2, cl. 3.

"Where a county is divided, a criminal act done before the division is to be prosecuted in the particular new county in which is the place of the offense." White, P. J., in Hernandez v. State, 19 Tex. App. 408 (1885).

CARLISLE v. STATE.

(Court of Criminal Appeals of Texas, 1893. 31 Tex. Cr. R. 537, 21 S. W. 358.)

HURT, P. J.[11] * * * In the city of Denison, Grayson county, between the hours of 1 and 2 o'clock a. m. on the night of the 28th of April, 1892, while lying in bed with his wife and infant child, W. T. Sharman was shot with a shotgun by some person standing upon a ladder placed against the house, shooting over the top of the window sash, which had been lowered about six inches. Charles Luttrell was indicted as principal, tried, and convicted of murder of the first degree with the death penalty, appealed to this court, and the judgment was affirmed. On May 25, 1892, John T. Carlisle was indicted, being charged as an accomplice, also, for the murder of W. T. Sharman, was on the 28th of October, 1892, tried and convicted of murder in the first degree, with the death penalty assessed against him also. From this conviction and judgment he appeals.

The acts constituting appellant an accomplice occurring in Collin county, counsel for appellant contends that Grayson county, the county of the homicide, was without authority to try the case. If an accomplice to a felony be guilty of a distinct offense from the felony committed by his principal, the position of counsel is well taken. We have no definition of a crime named or called "accomplice," but we are informed by our Code what acts and things will make a person doing them an accomplice to all felonies to which there can be an accomplice. We are aware that there are numerous opinions of learned courts strongly intimating that an accessory before the fact (our accomplice) is guilty of a distinct offense from that of his principal. We desire to notice the reason or legal ratiocination of these opinions.

The following proposition is supported by a strong line of authorities: Accessory before the fact in one state, to crime committed in another, cannot be punished in the state where the substantive crime is committed. The reasoning by which this proposition is sustained is that, as the acts constituting a person an accessory occurred in a state other than that in which the principal committed the crime, the state of the substantive crime cannot punish those acts or the perpetrators, because done beyond the jurisdiction of the state in which the crime is committed by the principal. Let us examine this subject, in the light of the same authorities which support the above proposition, a little further.

A. lives in Texas. He procures B., who also lives in Texas, to go to Missouri, and there commit an act which is a felony in Missouri. B. is innocent of anything wrong in what he does. These same authorities hold that Missouri would have authority to try and punish A. Upon what ground? Because A. would be the principal. Again, A. employs B. to go to Missouri, and there commit a misdemeanor.

[11] Part of this case is omitted.

B., with full knowledge of the criminal intent of A., would be guilty as a principal; and, as it was a misdemeanor, all would be principals, and Missouri would have authority to punish A. when in fact A. had done no act whatever in Missouri, except through B. Again, A. sends B. to Missouri armed and equipped for the purpose of murdering C., being instigated thereto by A. Missouri would not have authority to try and punish A., because all of his acts were done in Texas, and because he was accessory and not principal. Now for the dilemma. Suppose Missouri should by statute make accessories before the fact principals, as several states have done, then she would have authority to try and punish A. for the murder of C. when A. had done no act in Missouri personally, acting alone through his guilty agent, B.

What is the result of such doctrine? It is that the power or authority to punish acts committed beyond the border of the state, which are crimes within the state, depends upon technical distinctions between felonies and misdemeanors, accessories and principals, or whether the agent was guilty or innocent, and not upon the fact that the criminal act was or was not committed in the state.

There is another line of authorities resting upon solid foundation. The doctrine is this: That distinctions between accessories and principals rest solely in authority, being without foundation either in natural reason or the ordinary doctrine of law; for the general rule of law is that what one does through another's agency is to be regarded as done by himself. In this state there is no distinction between the punishment of an accomplice and a principal. Why? Because the crime is the same. In morals there are circumstances in which we attach more blame to the accomplice than to his principal; as, when a husband commands his wife, or master his servant, to do for his benefit a criminal thing, which in his absence is done reluctantly, through fear or affection overpowering a subject mind. That the crime committed by the accomplice is the same as committed by his principal is evident. This proposition rests upon solid legal ground. In 1 Broom. Leg. Max. (2d Ed.) 643, we find this maxim: "The principle of common law, 'qui facit per alium, facit per se,' is of universal application both in criminal and civil cases."

If appellant be guilty, of what offense is he guilty? He is guilty of murder of the first degree. Why is he guilty of murder of the first degree? Simply because he, with his malice aforethought, expressed through his agent and tool, Luttrell, killed W. T. Sharman. He is guilty because Luttrell's act was his act; Luttrell being his agent. Appellant is guilty of the murder of Sharman in Grayson county, though the acts constituting him an accomplice may have all occurred in Collin county. Why? Because, when his agent Luttrell shot and killed Sharman in the city of Denison, Grayson county, it was appellant, also, who, through Luttrell, shot and killed him in Grayson county. * * *

We are of opinion that the offense of the accomplice and his principal is the same, and, if at all, his crime was murder of the first de-

gree committed in Grayson county, and hence the venue of the case was in Grayson county.

Some further observations on this subject. We desire to call attention to the very wise remark of Judge Marcy in People v. Mather, 4 Wend. (N. Y.) 229, 256 (21 Am. Dec. 122). He says: "Writers on criminal law make some difference between the offense of principal and accessory, but it is chiefly as to the order and mode of proceeding against them." By statute of New York it is provided that all suits, informations, and indictments for any crime or misdemeanor, murder excepted, should be brought within three years after its commission. The word "murder" was held to include as well accessories before the fact as principals. If an accomplice is guilty of a distinct felony from that of his principal, then a prosecution for being an accomplice to murder is barred by three years, for such an offense is not named in the statute regulating limitations.

The indictment is sufficient, and not obnoxious to the objections made to it. The evidence complained of, under the circumstances of this case, was admissible. The evidence amply supports the verdict. The judgment is affirmed. Judges all present and concurring.[12]

HEWITT v. STATE.

(Supreme Court of Florida, 1901. 43 Fla. 194, 30 South. 795.)

MABRY, J.[13] In October, 1898, plaintiffs in error, Dick Hewitt and Lum Hewitt, were indicted in Bradford county for the murder of J. T. Johnson, and plaintiff in error, Moss Hewitt, and one Minnie Hewitt, were jointly indicted with them as accessories before, the fact of said murder. Upon a trial of the case in Bradford county in January, 1899, the jury acquitted Minnie Hewitt and disagreed as to the

[12] See, also, People v. Wiley, 65 Hun, 624, 20 N. Y. Supp. 445 (1892). But see People v. Hodges, 27 Cal. 340 (1865); Commonwealth v. Pettes, 114 Mass. 307 (1873).

"The offense is compounded of the connivance of the accessory and the actual killing by the principal felon, and the crime of the accessory, though inchoate in the act of counseling, hiring, or commanding, is not consummate until the deed is actually done. The law in such case holds the accessory before the fact to be guilty of the murder itself, not as principal, it is true, but as accessory before the fact; for it is the doing of the deed, and not the counseling, hiring, or commanding, that makes his crime complete, and it is for the murder that he is indicted, and not for the counseling or procuring. We hold, therefore, that the locus in quo of the offense of an accessory before the fact to the crime of murder is the county in which the murder is done, and that the jurisdiction is there. * * * The crime of the accessory before the fact being only complete when the murder is done, the jurisdiction for his trial is where the murder is done. This is 'the county in which the crime was committed, in the sense of the Constitution.'" McWhorter, J., in State v. Ellison, 49 W. Va. 74, 38 S. E. 574 (1901).

In U. S. v. Ramsay, Hempst., 481, Fed. Cas. No. 16,115 (1847), it was held that, under the act of congress giving the circuit court jurisdiction of murder, such courts did not acquire jurisdiction of the crime of accessory to murder.

[13] Part of this case is omitted.

other defendants. The case came on for trial at another term of court in Bradford county, held in October, 1899, and after the exhaustion of two special venires, one for one hundred jurors and the other for twenty-five, and the issuance of another for thirty jurors, the court made the following order, viz.: "Came again the defendants, each in his own proper person and attended by his counsel, whereupon, it appearing to the court that a qualified jury cannot be obtained in this county to try said case, now, therefore, it is considered that said case be and the same is hereby transferred and the venue changed to the circuit court of Duval county for trial." The order further provided for the transmission of the necessary papers to Duval county. It appears from a transcript of the proceedings in Bradford county that, in addition to the regular panel of jurors for the terms when the indictment was found and when the mistrial occurred, a special venire of one hundred jurors was served for the last-mentioned term. When the court made the order changing the venue on the unsuccessful effort to obtain a jury, it appears that defendants neither requested it nor interposed any objections thereto.

The case came on for trial in Duval county without any objection on the part of defendants, and thereupon Dick Hewitt and Lum Hewitt were convicted of murder in the second degree, and Moss Hewitt was convicted of being accessory before the fact of said offense.

From the judgment of the court imposing the sentences of the law upon the defendants, writ of error has been sued out by them, and two grounds of error are presented for consideration, viz.: First, the court erred in changing the venue from Bradford county; second, Moss Hewitt should be discharged because under the laws of Florida a party cannot be convicted as being an accessory before the fact to murder in the second degree.

Our present Constitution (section 11, Declaration of Rights) declares that "in all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed." This provision was not contained in the Constitution of 1868. Section 2358, Revised Statutes, provides that "all criminal causes shall be tried in the county where the offense was committed, except when otherwise provided by law." It is provided in section 2928, Revised Statutes, that "the judge of the circuit court may order a change of venue in all criminal cases, when he shall be satisfied that it is impracticable to get a qualified jury to try the same in the county in which the crime was committed," and the change hereby authorized may be ordered as provided in section 2929 "upon the application either of the prosecuting attorney or of the defendant upon affidavit setting forth the necessity for such change." By chapter 4394, laws 1895, it is enacted "that whenever it shall be made to appear to the satisfaction of the presiding judge of any of the circuit courts of this state that the venue of any cause, civil or criminal, then pending in such court, should for any of the grounds

now prescribed by law be changed, it shall be in the power and discretion of such judge to change the venue of such cause, civil or criminal, as the case may be, from the circuit court of the county where such cause is at the time pending to the circuit court of any other county within the same circuit, but said judge shall not be compelled to transfer said cause to any adjoining county." Other provisions as to transfer of causes need not be mentioned.

The provision in our Constitution in reference to the right of trial by an impartial jury in the county where the crime is committed is an important one to the accused. At common law a defendant had a right to be tried in the county in which the offense was alleged to have been committed, where he was surrounded by the influences of a good character if he had established one, and where the witnesses were accessible for the purposes of a trial. If an impartial trial could not be had in such county, the practice was to change the venue to some other county where such trial could be obtained. The abuse of the right to change the venue to the detriment of the accused would be serious to him, and no doubt constitutional provisions like ours were designed to permanently secure this right of trial by an impartial jury in the county where the offense is alleged to have been committed. Some courts have held that the guaranty is not only of an impartial trial, but also a trial in the county where the offense was committed, and that it was not competent for the Legislature to provide for a transfer to another county for any cause without the consent of the accused. Armstrong v. State, 1 Cold. (Tenn.) 337; Kirk v. State, Id. 344; State v. Knapp, 40 Kan. 148, 19 Pac. 728. Where a trial by an impartial jury can be secured in the county where the crime is committed the accused cannot be deprived of a trial there, even under sanction of legislative action. If he applied for a change of venue and it be granted on his request, it may very properly be said that he has waived the right and no question can arise in reference to it.

We do not think it was the purpose of the framers of the Constitution to force a trial in a county where an impartial jury cannot be had, as to do so would defeat the greater and more important right of a speedy and public trial by an impartial jury. State v. Miller, 15 Minn. 344 (Gil. 277). Our statute is comprehensive enough to authorize the court to direct a change of venue when an impartial jury cannot be secured in the county where the offense is alleged to have been committed, and limiting it to the impossibility of securing an impartial jury in that county, we think it is constitutional. It is not contended in this case that an actual necessity for the change did not exist when the order changing the venue was made. The only point of contention under this head is that the law authorizing the change was unconstitutional. The record clearly indicates that the trial court put the question of obtaining an impartial jury in Bradford county to actual test, and in such a case we do not conceive that the provision of our Constitution was intended as a barrier against the change. The act of the

Legislature may and should have effect in so far as it does not conflict with the Constitution, and to the extent of authorizing a change under circumstances disclosed in this case we are of opinion that there is no conflict. Care should, however, always be exercised to avoid any deprivation of the right of the accused to his constitutional mode of trial in applications to change the venue without his consent. * * *

Finding no error in the points presented, the judgment must be affirmed; and it is so ordered.[14]

[14] See, also, State v. Miller, 15 Minn. 344, Gil. 277 (1870). Contra, State v. Denton, 6 Cold. (Tenn.) 539 (1869); State v. Kindig, 55 Kan. 113, 39 Pac. 1028 (1895).

The matter of change of venue for prejudice in the county is now generally regulated by statute. Whether the application for such change shall be granted is usually made to rest in the sound discretion of the judge, to whom the application is properly made; and the exercise of that discretion will not be reviewed on appeal, unless it has been clearly abused. Smith v. State, 145 Ind. 176, 42 N. E. 1019 (1896); State v. Hawkins, 23 Wash. 289, 63 Pac. 258 (1900). For discretion of court, when the application is founded on prejudice of the judge, see State v. Hawkins, 23 Wash. 289, 63 Pac. 258 (1900); State v. Thomas, 32 Mo. App. 159 (1888); State v. Grinstead, 10 Kan. App. 78, 61 Pac. 975 (1900).

For procedure for change of venue on ground of disqualification of judge, see Kelly v. Ferguson, 5 Okl. Cr. 316, 114 Pac. 631 (1911).

CHAPTER II

PROSECUTION

The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former way is either by presentment or indictment.

I. A presentment, generally taken, is a very comprehensive term, including not only presentments properly so called, but also inquisitions of office and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment before the party presented can be put to answer it. An inquisition of office is the act of a jury summoned by the proper officer to inquire of matters relating to the crown upon evidence laid before them. Some of these are in themselves convictions, and cannot afterward be traversed or denied; and therefore the inquest or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of felo de se; of flight in persons accused of felony; of deodands and the like; and presentments of petty offenses in the sheriff's tourn or courtleet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined, as particularly the coroner's inquisition of the death of a man when it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this inquisition and may dispute the truth of it, which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which on the part of our lord the king shall then and there be commanded them.

The remaining methods of prosecution are, without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these, by the common law, was when a thief was taken with the mainor; that is, with the thing stolen upon him in

manu. For he might, when so detected flagrante delicto, be brought into court, arraigned and tried without indictment, as, by the Danish law, he might be taken and hanged upon the spot, without accusation or trial. But this proceeding was taken away by several statutes in the reign of Edward the Third, though in Scotland a similar process remains to this day. So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of information.

III. Informations are of two sorts: First, those which are partly at the suit of the king, and partly at that of a subject; and, secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of qui tam actions (the nature of which was explained in a former book), only carried on by a criminal instead of a civil process, upon which I shall therefore only observe that, by the statute 31 Eliz. c. 5, no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offense; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offense.

The informations that are exhibited in the name of the king alone are also of two kinds: First, those which are truly and properly his own suits, and filed ex officio, by his own immediate officer, the Attorney General; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer, and they are filed by the king's coroner and attorney in the Court of King's Bench, usually called the master of the crown office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed ex officio by his own Attorney General, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal, which power, thus necessary not only to the ease and safety but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the crown office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious

kind, not peculiarly tending to disturb the government (for those are left to the care of the Attorney General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion.

4 Black. Comm. 301 et seq.

A second sort of proceeding in cases capital without indictment is where an appeal is brought at the suit of the party, and the plaintiff is nonsuit upon that appeal, yet the offender shall be arraigned at the king's suit upon such appeal.

2 Hale, P. C. 149.

STATE v. ANDERSON.

(Supreme Court of New Jersey, 1878. 40 N. J. Law, 224.)

BEASLEY, C. J.[1] From the facts agreed upon, it appears that there are two indictments in the county of Passaic against the defendant: The one for the sale of ardent spirits without license, and the other for keeping a disorderly house, by frequently selling therein ardent spirits contrary to law. Both offenses were committed in the city of Paterson, in which city there was, at the time in question, an ordinance forbidding the keeping of a disorderly house within the city, under a penalty of $25.

By the act approved March 26, 1874 (Rev. St. 1874, p. 493), it is declared that the provisions of the thirty-seventh section of the act concerning inns and taverns, and those of the supplements thereto, approved respectively March 8, 1848, and February 20, 1849, which are the clauses making it an indictable offense to sell ardent spirits without license, shall not thereafter apply to offenses committed in any of the incorporated cities of this state, the ordinances of which shall provide for the punishment of the unlicensed sale of spirituous liquors, and for the punishment of the same on Sunday. The second section of the same statute enacts that, where the ordinances of such cities provide for the punishment of the offense of keeping a disorderly house, it shall not thereafter be lawful to prosecute, by indictment, any person accused of keeping a disorderly house in such city, where the alleged offense consists only of the continuous or frequent violation of the provisions of the laws above mentioned inhibiting the sale of ardent spirits by unqualified persons. * * *

Is the act constitutional? The keeping of a disorderly house is a crime indictable at common law, and in this state it is punishable by fine and imprisonment in the state prison. Therefore it is clear that if this offense can, for the purpose of crimination, trial, and punishment, be put into the hands of these municipal authorities, it follows that all

[1] Part of this case is omitted.

common-law offenses of the same grade can be, in like manner, so deposited. This, I think, cannot be conceded. Such an arrangement would, in a very plain way, infringe an important provision of the Constitution of this state. Article 1, § 9, of that instrument declares that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace," etc. The purpose of this clause was to prevent the bringing of any citizen under the reproach of being arraigned for crime before the public, unless, by a previous examination taken in private, the grand inquest had certified that there existed some solid ground for making the charge. It took from the law officer of the state, the Attorney General, one of the established prerogatives of his office—that of filing his information against supposed offenders, and thus putting them on trial at his own volition. The reputation of every man was thus put under the care of a single specified body. The language of the constitutional clause is very comprehensive, and the specified exceptions show conclusively that it was intended to cover the residue of the entire field of criminal accusation. In the presence of such a prohibition, how then is it permissible to put a man on trial before a city court, charged with this common-law offense, without the preliminary sanction of a grand jury? If it be said the punishment is only a fine, the answer is: The restraining clause in question has nothing to do with the result or effect of the trial, its object being to save from the shame of being brought before the bar of a criminal court, except in the authorized method after an antecedent inquisition. I am clearly of opinion that a trial of a person for this offense before the municipal court would be an act utterly void.

This conclusion also has led me to the further result that the clause of the statute in question must be held to be a nullity. The declaration that was intended to prohibit the trial of the offense of keeping a disorderly house by an indictment is too dependent on the establishment of another mode of trial and punishment to permit it to stand as an independent provision. The repeal of the old method of prosecution, and its substitute, are part of a scheme, and, as the scheme fails, the entire section must fail. The present indictment for this crime is sustainable.

With regard to the other indictment, the questions involved are of a different character. The offense of selling liquor without a license is a purely statutory offense. Independently of a prohibition by the Legislature, such a sale is neither immoral nor illegal, and the lawmaker, therefore, can put it under such control as may be thought best. Not being in its nature an indictable offense, it can be made punishable by a penalty, without indictment. Such is the effect of the present law in certain localities, and I can perceive nothing unconstitutional or illegal in such an arrangement. This law, therefore, which gives the exclu-

sive right of prosecution and punishment to the city of Paterson in this case, is valid and must be sustained.

The sessions should be advised accordingly.[2]

STATE v. KELM.

(Supreme Court of Missouri, 1883. 79 Mo. 515.)

PHILLIPS, C.[3] This is a prosecution for petit larceny, instituted in justice's court on the affidavit of a private citizen. On a trial had therein the defendant was fined $1. From this judgment he appealed to the circuit court, where, on a trial de novo, he was again found guilty and fined $10. The circuit court sustained a motion in arrest of judgment for certain defects in the proceedings unnecessary to particularize, as our decision is placed upon other grounds fatal to the proceeding. The state has brought the case here on appeal.

Section 12, art. 2, of the state Constitution declares that "no person shall, for felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; in all other cases offenses shall be prosecuted criminally by indictment or information as concurrent remedies."

In Ex parte Slater, 72 Mo. 102, this court held that the word "indictment," as used in said section, "has a well-defined meaning, and must be accepted and understood as having been inserted in the Constitution with the meaning attached to it at common law." The court then quoted from Bacon's Abridgment and other common-law text-writers to show what were the qualities and incidents of an indictment as employed in the ancient proceedings.

This being unquestionably a correct construction of the term "indictment" as used in the Constitution, it must follow that the term "information," as employed in the same section, should be subjected to the same common-law meaning. The text-books are uniform in defining an information to be an accusation or complaint exhibited against a person for some criminal offense, "either immediately against the king or against a private person, which, from its enormity or dangerous tendency, the public good requires should be restrained and punished, and differs principally from an indictment in this: That an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it. 5 Bacon's Abr. DD. 167, 170, 172; Hawk. P. C. 26, § 4.

[2] See, also, Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288 (1891).

"When the punishment will be only an amercement, the presentment is treated, not as an accusation, but as testimony, and conclusive testimony. We believe that in Henry III's day anything that we could call a trial of a man upon an indictment for misdemeanor was exceedingly rare." Pollock and Mait. Hist. Eng. Law, II, 649.

[3] Part of this case is omitted.

The information at common law was uniformly exhibited by the Attorney General in certain cases, but at his discretion, except, perhaps, where directed by the House of Lords or House of Commons, or some of the high officials, as the lords of the treasury, etc. The king's coroner and attorney in the Court of King's Bench, called the crown officer, might file informations. This he might do, and usually did, at the prompting of some private individual. But no private citizen could beget a criminal prosecution on his mere affidavit or information.[4] 1 Bishop, Crim. Proc. (3d Ed.) 141, 143; Jacob's Law Dict. title "Information." Bishop (section 144) says: "In our states the criminal information should be deemed to be such, and such only, as in England is presented by the Attorney or the Solicitor General. This part of the English common law has plainly become common law with us. And as with us the powers, which in England are exercised by the Attorney General and Solicitor General, are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prosecute by information as a right adhering to their office, and without leave of court." Wharton lays down the same doctrine. Crim. Pr. and Pr. (8th Ed.) § 87.

So jealous were the English people, from whom comes our common-law heritage, of their personal liberty and the protection of due process of law, that they contended for a time earnestly against the summary proceeding by information as violative of the Magna Charta, and threw around its exercise many safeguards against abuses. If reasons were necessary to justify the conclusion reached in this opinion, they are numerous why no such right should be intrusted to a private citizen to inaugurate a proceeding like this upon his own affidavit. The injustice and abuse of such process, left at the caprice, spite, or malice of one not under the sanction of official duty, is apparent, and therefore the framers of the Constitution employed the term "information," without more, well understanding its common-law import and meaning. And we are not authorized, nor is the Legislature, to extend its meaning and use. * * *

The proceeding in question should have been dismissed; but, as the court below arrested the judgment, its judgment will be affirmed, and the prosecution dismissed. All concur.[5]

[4] "Informations at common law (which are very ancient in this court) were filed by the coroner, who did it upon any application, as a matter of course. The statute of 4 W. & M. c. 18, was therefore made to limit it, and other grounds there are by which the court has limited itself." Mansfield, C. J., in Rex v. Robinson, 1 W. Black. 541 (1765).

[5] Accord: State v. Dover, 9 N. H. 468 (1838).

In some jurisdictions that permit prosecution by information, statutes require that no such information shall be filed until the accused shall have had a preliminary examination before an examining magistrate or officer, unless accused is a fugitive from justice or waives the examination. See Washburn v. People, 10 Mich. 372 (1862).

CHAPTER III

ARREST

SECTION 1.—WHAT CONSTITUTES ARREST

An arrest is the apprehending and first restraining of a man's person, depriving it of his own will and liberty, and may be called the beginning of imprisonment.

Dalton's Country Justice, c. 118.

RUSSEN v. LUCAS, Sheriff, et al.

(Court of King's Bench, 1824. 1 Car. & P. 153.)

Action against the sheriff for an escape. The only point in dispute was whether a person named Hamer was arrested by the sheriff's officer and escaped.

The officer having the warrant went to the One Tun tavern in Jermyn street, where Hamer was sitting. He said, "Mr. Hamer, I want you." Hamer replied, "Wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

ABBOTT, C. J. Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete; but, on these facts, if I had been applied to for an escape warrant I would not have granted it.

Nonsuit.[1]

[1] See, also, Baldwin v. Murphy, 82 Ill. 485 (1876).

In Grosse v. State, 11 Tex. App. 364 (1882), the marshal who had taken the prisoner in charge testified that he took charge of the prisoner in his capacity of marshal, but that he did not consider the prisoner under arrest. The court said: "The question is not so much the intentions and opinions of the marshal in regard to the matter, but the actual situation of the defendant; and he was not only in actual but intentional arrest."

REGINA v. NUGENT.

(Dundalk Spring Assizes, 1868. 11 Cox, Cr. Cas. 64.)

The prisoner was indicted for that he, being lawfully in custody under a warrant of the Lords Justices of Ireland, unlawfully did escape out of the said custody. * * *

BATTERSBY, J. * * * Evidence was given that two policemen had gone up to the prisoner's house, and had met him in the yard, and asked him to come into the parlor. On going in, they said the sub-inspector of police wanted to see him. The prisoner asked what he wanted. They said he would tell him himself when he came. He asked, "Am I to consider myself under arrest?" They said he might. They did not, however, tell him there was a warrant for his arrest. One of the policemen then went away, and the other remained in the room with the prisoner. The prisoner asked if he might go into the next room for his dinner. The policemen said, "No" but that he might have his dinner brought in there. Shortly after, Sub-Inspector Gardiner came in. He held the warrant in his hand, and said to the prisoner that this was a warrant for his arrest. He did not read it, nor touch the prisoner. The prisoner said, "Is my name in it?" and came forward, as though to look at the warrant, turned the key in the door, and leaped out of the window. He was not arrested till nearly one year and a half afterwards.

Sub-Inspector Gardiner admitted, on cross-examination, that the movements of the prisoner and his conversation were not of a nature to imply submission to the warrant, but merely a desire to gain time.[2]

Falkiner, Q. C., for the prisoner, submitted that there was no evidence of an arrest. The policemen had made no arrest in the first instance. The prisoner had merely waited for the visit of the sub-inspector at their request. Even if the prisoner was under compulsion, it was not a legal arrest, as the police had not a warrant, nor did they communicate its existence to the prisoner. On the arrival of the warrant there was no arrest, actual or constructive. After Gardiner's arrival, the prisoner was never put under compulsion, nor made any submission.

HIS LORDSHIP ruled that the arrest was perfect. The arrest by the policemen was good, subject to the production of the warrant afterwards. On the arrival of Gardiner with the warrant the arrest was complete. * * *

Convicted.[3]

[2] Part of this case is omitted.

[3] See, also, Williams v. Jones, cas. t. Hardw. 293 (1735); Shannon v. Jones, 76 Tex. 141, 13 S. W. 477 (1890).

SECTION 2.—WHO MAY ARREST

It has been provided by the king and by his counsel that all, as well knights as others, who are of fifteen and more, ought to swear, that * * * if they shall hear hue and cry * * * they shall follow with their households and the men of their land, * * * and that they shall arrest, as far as may be in their power, those whom they regard as suspected without waiting for the mandate of the justice or of the viscount, and that what they shall have done thereupon they shall certify to the justices or the viscount.[4]

Bracton, fol. 116.

COMMONWEALTH v. CAREY.

(Supreme Judicial Court of Massachusetts, 1853. 12 Cush. 246.)

This was an indictment for murder, tried at Cambridge, June 2, 1851, before the Chief Justice, and Fletcher and Bigelow, JJ., charging the prisoner with the murder of George Heywood, at Lincoln, in the county of Middlesex, the 27th day of December, 1850. * * *

SHAW, C. J.[5] * * * Upon the question of the legality of the arrest, the opinion of the court was that any person, whether a police officer or a private person, may lawfully arrest any one guilty of a felony, with a view to bring him before a magistrate, that proceedings may be further taken to bring him to punishment.[6]

There was this difference, however, that a private person, who arrests another on a charge of felony, does it at the peril of being able to prove a felony actually committed by the person arrested.[7]

But if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually

[4] "The ordinary man seems to have been expected to be very active in the pursuit of malefactors, and yet 'to act at his peril.' This may be one of the reasons why, as any eyre roll will show, arrests were rarely made, except when there was hot pursuit after a 'hand-having' thief." 2 Pol. & Mait. Hist. Eng. Law, 581.

[5] Part of this case is omitted.

[6] Accord: On fresh pursuit: Commonwealth v. Grether, 204 Pa. 203, 53 Atl. 753 (1902); Rex v. Howarth, 1 Moody, 207 (1828).

[7] Accord: Siegel, Cooper & Co. v Connor, 70 Ill. App. 116 (1897). The more general rule is stated by Savage, C. J., in Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702 (1829), as follows: "If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested." Accord: Allen v. Wright, 8 C. & P. 522 (1838); Reuck v. McGregor, 32 N. J. Law, 70 (1866); Teagarden v. Graham, 31 Ind. 422 (1869); Brooks v. Commonwealth, 61 Pa. 352, 100 Am. Dec. 645 (1869); Carr v. State, 43 Ark. 99 (1884).

committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful.

Nor is it necessary, when a third person makes a complaint to a peace officer against a person, and gives him in charge to the officer, that the accusation should in terms technically import a felony; but when the language in its popular sense would import such charge, it is sufficient, as where one says to a peace officer, I wish you to take such a person in charge for having in his possession counterfeit bills, the natural import is that he intends to charge the party accused with having in his possession counterfeit bills, knowing them to be counterfeit, and with an intent to pass the same, without which incidents such possession would be innocent, and import no criminal charge at all.

But the court were further of opinion that a constable or other peace officer could not arrest one without a warrant for a crime proved or suspected, if such crime were not an offense amounting in law to felony.[8]

This is the old established rule of the common law, adopted and acted upon in this commonwealth, by which courts of justice are bound to be governed, until altered by the Legislature; that anciently there was a broad and marked distinction between felony and misdemeanor, the former being attended at common law with forfeiture of all the offender's goods; that by the statutes of this commonwealth, and especially by the revised statutes, the line of distinction between felonies and misdemeanors was in a great measure obliterated, and in many instances the law regarded as misdemeanors offenses of a greater moral turpitude than many felonies, yet it had not changed the rule in question, though perhaps it might be more wise in the Legislature to make the rule in question applicable to offenses measured by a differ-

[8] Accord: S. A. & A. Ry. Co. v. Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542 (1898); In re Way, 41 Mich. 299, 1 N. W. 1021 (1879); Commonwealth v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475 (1893). Except in breaches of the peace when the officer is present at the time the breach of the peace is committed. Coupey v. Henley, 2 Esp. 540 (1796); Shanley v. Wells, 71 Ill. 78 (1873); Pow v. Beckner, 3 Ind. 475 (1852); Cook v. Nethercote, 6 C. & P. 741 (1835); Fox v. Gaunt, 3 Barn. & Adol. 798 (1832). Or unless the offense may be reasonably supposed to eventuate in a felony, as wounding in an affray. Coupey v. Henley, 2 Esp. 540 (1796); Shanley v. Wells, 71 Ill. 78 (1873).

Statutes now very generally allow arrests by officers without warrant for misdemeanors done in the presence of the officer, or on immediate pursuit of the offender. O'Brian v. State, 12 Ind. 369 (1859); Hanway v. Boultbee, 4 C. & P. 350 (1830).

"The authorities from the Year Books down to the most recent and approved text-writers flow in one uniform course, and all agree that a justice of the peace, in a criminal case, may authorize any person whom he pleases to be his officer. All, however, consider that it is better to direct his process to the constable of the place where it is to be executed; and this because no other constable (or, a fortiori, a private person) can be compelled to execute it." King, P., in Commonwealth v. Keeper, 1 Ashm. (Pa.) 183 (1828).

ent standard of aggravation, as by being punishable in the state prison, or otherwise.

The court further held, under this rule, and as applicable to this case, that if Mr. Heywood suspected, or had reasonable cause to suspect, and acted on the suspicion, that the person had stolen money, or any other property, from the ticket office, inasmuch as such stealing would have been larceny, and of course felony, the arrest was lawful, and the homicide committed by the person in attempting to escape would be murder, and not manslaughter, and that this would be a question of fact for the jury. But, further, that the breaking open of the ticket office, though with an intent to steal, but without in fact stealing, was a misdemeanor, and not a felony, and the arrest of the prisoner for that offense, or on a suspicion and belief, by a peace officer, that he had committed that offense, would not be a lawful arrest. It was the breaking of an office in the daytime, and came under the provisions of Rev. St. c. 126, § 13.

The court remarked that St. 1804, c. 143, § 5, which had been cited, had denominated the breaking a shop in the daytime, under certain circumstances, a felonious offense; yet two circumstances rendered that statute inapplicable to the present case. One was that it was accompanied with the circumstance that such breaking be done when some one is in the house, and putting such person in fear, one of the aggravating circumstances belonging to the offenses of burglary and robbery; and the other was that the statute has been repealed, without the re-enactment of any similar provision describing it as felony, but leaving it, as at common law, in the class of misdemeanors. If the deceased, therefore, in the present case, although legally qualified as a peace officer, understood, suspected, and believed only that the prisoner had broken open the ticket office, though with an intent to steal, and, acting upon that knowledge, suspicion, or belief, arrested the person without a warrant, it was an unlawful arrest.

In regard to the letter sent by Blaisdell to the deceased, the court were of opinion that it did not charge a felony, so as to make the arrest lawful without a warrant. It did not state or imply that the prisoner had stolen anything from the Stony Brook depot. Breaking open the depot would, of itself, be an offense for which the perpetrator would be liable to a severe punishment, but in character it was a misdemeanor, and not a felony; and, therefore, charging the prisoner with having broken open that depot did not directly, or by implication, charge a felonious offense, for which he could lawfully be arrested without a warrant. It is distinguishable from the case before mentioned, of giving one in charge for having counterfeit notes in his possession, because that charge necessarily implies a guilty knowledge and a guilty purpose, which, if they make the act criminal at all, make it a felonious one. Such were held to be the rules of law under which the court determined that the case must go to the jury.

Upon the announcement of the foregoing rulings, the counsel for

the prisoner stated that they were not aware of any testimony which would essentially modify or control the case as it was presented by the evidence submitted on behalf of the government; and they proposed to submit it to the jury under the instructions of the court.

The Chief Justice then charged the jury in conformity with the foregoing rulings, and they returned a verdict of guilty of manslaughter.

STATE v. TAYLOR et al.

(Supreme Court of Vermont, Windsor, 1898. 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648.)

Indictment of G. O. Taylor and John O'Donald for an assault with intent to kill and murder. Verdict and judgment of guilty, and sentence imposed at the respondents' request. The respondents excepted. Exceptions sustained.

MUNSON, J.[9] The alleged assault was committed upon Paul Tinkham, constable of Rochester, and three persons acting under him, while they were effecting an arrest of the respondents and two others, without a warrant, on suspicion of felony. The officer acted upon information received from Brandon by telephone, to the effect that the post office at Ticonderoga, N. Y., had been burglarized the night before, and that four persons suspected of the crime had left Forestdale, going in the direction of Rochester. When met by the officer and his assistants, the suspected party were coming along the highway in a wagon, driven by a liveryman from Forestdale.

The jury have found, under the charge of the court, that when Tinkham met the respondents' party he said to them that he arrested them by the authority of the state of Vermont, and that, upon inquiry being made as to which was the officer, Tinkham was designated as such by one of his party. The remainder of the transaction must be taken to have been in accordance with the testimony most favorable to the respondents' claim. The purport of this was that one of the respondents' party then asked Tinkham if he had any papers, and that Tinkham thereupon pulled a revolver from his pocket, saying that was all the papers he needed, at once returning the revolver to his pocket; and that respondent Taylor then said, with an oath, "You can't take this party without papers;" and that upon this all four of the suspected persons commenced to get out of the wagon, some of them firing at the constable's party as they did so.

The jury were instructed, in substance, that, if Tinkham had reasonable cause to suspect that the respondents had committed a burglary, he could arrest them without a warrant; and that if he told them that he arrested them by the authority of the state of Vermont, and if they knew he was an officer, it was their duty to submit; and that, if

[9] Part of this case is omitted. The judgment was reversed on other grounds.

they shot the officer under these circumstances, they were guilty of an assault with intent to murder. The respondents insist that the officer had no right to arrest without a warrant for a felony committed in another state; and that, if he had that right, there was a failure to disclose his authority, which justified their resistance; and that, in any event, the manner of the arrest was such that the grade of the offense should have been left to the determination of the jury.

It has been held in most of the states that, when one charged with the commission of a felony in one state escapes to another, he may be there arrested and detained before a demand for his return has been made by the governor of the state from which he has fled. In most of the cases where this doctrine has been enunciated the arrest was made upon the warrant of a magistrate. But in State v. Anderson, 1 Hill (S. C.) 327, it was held that an arrest by a private person, without a warrant, could be justified by showing prima facie that a felony had been committed in another state, and that the party arrested was the perpetrator. It is clearly the tenor of the decisions that the machinery provided for the arrest of local offenders is available for the arrest of fugitives from another jurisdiction; and it must follow that, when the arrest without warrant is made by an officer, it will be sufficient for his justification if it appear that he had reasonable cause to believe that the person arrested had committed a felony in another state, although more than this may be required for his detention, when brought before a magistrate. So, in Ex parte Henry, 29 How. Prac. (N. Y.) 185, it was said that the officers were undoubtedly authorized to arrest the prisoner upon reasonable ground of suspicion, although there was no proof on the hearing that the suspicion was well founded. It is well settled that the person whose arrest is attempted must have notice of the authority and purpose of the person who undertakes to arrest him. The first case in which this matter is elaborately treated is that of Mackaley, reported in Cro. Jac. 279, and more fully in 9 Coke, 61. * * *

It is frequently said in the text-books and in judicial discussions that an officer must show his warrant, or state the grounds of the arrest, if demanded. But an examination of the authorities will show conclusively that this is not a part of the arrest, but a duty which immediately follows it. Upon submitting to the officer, the arrested party is entitled to this information; but he cannot put off the arrest, and increase his chances of escape, by requiring an explanation in advance. * * * It is evident from the adjudged cases that in the rule above stated, as to what is essential in making an arrest, notice of the officer's authority means notice of his official character, and not of the exact circumstances which authorize the arrest; and that notice of his purpose relates to the purpose to arrest, and not to the purpose of the arrest. It is beyond question that, in making an arrest by virtue of a warrant, the officer cannot be required to show the warrant,

or state the substance of it, until the arrest is accomplished. In this case there was no warrant, and the officer could arrest without one only in certain classes of cases. But we think the officer was no more obliged to state the conditions which authorized him to arrest without a warrant than he would have been to produce his warrant, or state the substance of it, in case of an arrest on warrant. All that the respondents could require, in the first instance, was a statement sufficient to show that the person who demanded their arrest was an officer, acting in his official capacity. This was clearly covered by the designation of Tinkham as the officer, and by his statement that he arrested them by the authority of the state of Vermont.

It appears, then, that the words of arrest employed by the officer were such as entitled him to an immediate submission to his authority, without answering the question regarding papers. * * * Exceptions sustained, sentence vacated, and cause remanded.

SECTION 3.—RIGHTS AND DUTIES OF PERSON MAKING ARREST

MACKALLEY'S CASE.

(Court of King's Bench, 1611. 9 Coke, 65, b.)

By the king's command all the judges of England were ordered to meet together to resolve what the law was, upon the said record; and accordingly all the judges of England, and barons of the exchequer, met together the beginning of Hilary term now last past, and heard counsel learned upon this special verdict, as well of the prisoners, as of the king; that is to say, Serjeant Harris the younger, Anthony Diot and Randall Crewe of counsel with the prisoners, and Yelverton, Waters, and Coventry for the king. And the matter was very well argued by counsel learned on both sides at two several days in the same term; and divers exceptions were taken to the indictment and to the verdict also.

First, against the indictment five exceptions were moved. (1) Because it appears that the arrest was tortious, and by consequence the killing of the serjeant could not be murder, but manslaughter, and they argued that the arrest alledged in the indictment was tortious, because it was made in the night, that is to say, 18 Diem Nov. inter horas quintam et sextam post meridiem, which appears to the court to be in the night, and the night is a time of rest and repose, and not to arrest any by his body, for thereof would ensue (as in hoc casu accidit) bloodshed; for the officer and minister of justice cannot have such assistance, nor can the peace be so well kept in the night, that is to say, in

tenebris, as in the day, in aperta luce: and the prisoner cannot know the officer or ministers of justice in the night; nor can the prisoner so soon find sureties for his appearance in the night and thereby avoid his imprisonment, as he may in the day: and they cited 11 H. VII, 5, a, that the lord shall not distrain for his rent or services in the night. But it was answered by the counsel with the king, and in the end resolved by all the judges and barons of the exchequer, that the arrest in the night is lawful, as well at the suit of a subject as at the king's suit; for the officer or minister of justice ought to arrest him when he can find him; for otherwise perhaps he will never arrest him. * * *

As the officer or minister of justice may, by force of a warrant directed to him, arrest any at the king's suit either for felony or other crime in the night, so may he do at a subject's suit; for the king has no more prerogative as to the time to make an arrest, than a subject; for the arrest is to no other intent than to bring the party to justice; and it appears by the opinion of the court in the King's Bench in Semaine's Case in the fifth part of my Reports, that the sheriffs may arrest in the night, as well at the suit of a subject, as at the king's suit. And in Heydon's Case in the fourth part of my Reports it is resolved, that if one kills a watchman in execution of his office, it is murder, and yet that is done in the night; and if an affray be made in the night, and the constable, or any other who comes to aid him to keep the peace, be killed, it is murder; for when the constable commands them in the king's name to keep the peace, although they cannot discern or know him to be a constable, yet at their peril they ought to obey him.[10]

It was also resolved, that although in truth between five and six of the clock in November is part of the night, yet the court is not bound ex officio to take conusance of it, no more than in the case of burglary, without these words, in nocte ejusdem diei, or noctanter.

2. It was objected, that Sunday is not dies jurisdicus, and therefore no arrest can be made thereon, but it is the sabbath, and therefore thereon everyone ought to abstain from secular affairs for the better worship and service of God in spirit and truth. As to that it was answered and resolved, that no judicial act ought to be done on that day, but ministerial acts may be lawfully executed on the Sunday; for otherwise peradventure they can never be executed; and God permits things of necessity to be done that day; and Christ says in the Gospel, "Bonum est benefacere in Sabbatho." * * *

4. It was objected, that the said arrest found by the verdict was not lawful, for the serjeant in this case ought to have, when he arrested him, shewed at whose suit, out of what court, for what cause he made the arrest, and in what court it is returnable, to the intent, that if it be for any execution, he might pay the money, and free his body; and if it be upon mean process, either to agree with the party to put

[10] Part of this case is omitted.

in bail according to the law, and to know when he shall appear, as it is resolved in the Countess of Rutland's Case, in the sixth part of my Reports, f. 54. But in the case at bar the serjeant said nothing but "I arrest you in the king's name, at the suit of Mr. Radford," and so the arrest not lawful, and by consequence the offense is not murder. As to that it was answered and resolved, that it is true that it is held in the Countess of Rutland's Case, that the sheriff, etc., or serjeant ought upon the arrest to show at whose suit, etc., but that is to be intended when the party arrested submits himself to the arrest, and not when the party (as in this case Murray did) makes resistance and interrupts him, and before he could speak all his words, he was by them mortally wounded and murdered, in which case, the prisoners shall not take advantage of their own wrong. It was also resolved, that if one knows that the sheriff, etc., has process to arrest him, and the sheriff, etc., coming to arrest him, the defendant to prevent the sheriff's arresting him, kills him with a gun or any other engine or weapon, before any arrest made, it is murder; a fortiori in the case at bar, when he knew by the said words, that the serjeant came to arrest him. * * *

6. It was objected, that the serjeant at the time, nor before the arrest showed the prisoner his mace; for thereby he is known to be the minister of the law, and from thence he has his name, S. Serviens ad clavam; et non allocatur for two causes: (1) Because the jury have found, that he was serviens ad clavam dicti viceconitis, et juratus, et cognitus, et minister cur; and a bailiff sworn and known need not (although the party demands it) show his warrant; nor any other special bailiff is not bound to show his warrant, without demand of it (8 Edw. IV, 14, a; 14 Hen. VII, 9, b; 21 Hen. VII, 23, a), and where the books speak of a known bailiff, it is not requisite that he be known to the party who is to be arrested, but if he be commonly known it is sufficient. (2) If notice was requisite, he gave sufficient notice when he said, "I arrest you in the king's name," etc., and the party at his peril ought to obey him; and if he has no lawful warrant, he may have his action of false imprisonment. So that in this case without question the serjeant need not show his mace; and if they should be obliged to show their mace, it would be a warning for the party to be arrested to fly. * * *

ANONYMOUS.

(Upper Bench, 1650. Style, 238.)

The court was moved that one was arrested upon a day of thanksgiving appointed by Parliament, and that he was forced to put in bond to the sheriff for his appearance, and therefore it was prayed that the party arrested might be discharged, and that the bond given to the sheriff might be delivered up.

ROLL, the Chief Justice, answered: Indict the bailies that made the arrest, or bring your action against them, if you please, for we will not discharge the party arrested.[11]

ANONYMOUS.

(Upper Bench, 1653. Style, 395.)

The court was moved to discharge one Cullins, that was arrested as he was attending the court to give testimony as a witness in a cause, and for an attachment against the parties that did arrest him.

GERMAN, Justice (absente, ROLL, Chief Justice). Take a supersedeas, and let the parties show cause why an attachment shall not be granted against them that arrested him.[12]

UNITED STATES v. RICE.

(Circuit Court, W. D. North Carolina, 1875. 1 Hughes, 560, Fed. Cas. No. 16,153.)

On the 15th of last September, Andrew Woody, of Spring Creek, Madison county, was killed by Noah H. Rice, a United States deputy marshal, who was endeavoring to serve a capias on him for violation of the internal revenue laws. From facts developed before the court it appears that Woody had expressed a determination to resist any process which might issue against him, and had threatened to kill the defendant, Rice, if he attempted to arrest him. When this officer came upon Woody, the latter was armed with a rifle. His demeanor was hostile, and when commanded to surrender he so acted as to impress the officer with the belief that his intention was to shoot him, and in self-defense he fired upon Woody with fatal effect. Rice came to Asheville and surrendered himself to the authorities, was examined by Commissioner Watts on application for bail, and committed to jail. His case was finally removed to the United States court. On Tuesday, May 11, 1875, he was placed upon trial for his life. The jury having requested full instructions from the bench, they were given as follows by

DICK, J.[13] As this is a case of considerable importance to the defendant, and also to the due administration of justice, I have deemed

[11] By St. 29 Car. II. c. 7, the service of all processes, warrants, orders, etc., on Sunday, were made unlawful, except for treason, felony, or breach of the peace. Under this statute it was held that any offense which subjected the party to an indictment was constructively a breach of the peace. See Pearce v. Atwood, 13 Mass. 347 (1816).

[12] See Carle v. Delesdernier, 13 Me. 363, 29 Am. Dec. 508 (1836); State v. Polacheck, 101 Wis. 427, 77 N. W. 708 (1898).

[13] Part of the charge is omitted.

it proper to commit to writing my instructions to the jury upon the questions of law involved. * * *

It is conceded that the alleged homicide was committed by the defendant, and he places his defense upon the ground that he was a regular constituted officer of the United States, and had in his hands at the time of the homicide the process of law which authorized and commanded him to arrest the deceased for a crime against the United States; that the deceased resisted the execution of such process with a deadly weapon in his hands, and had manifested a purpose to use such deadly weapon in resistance; and that the homicide was necessarily committed in the attempt to make an arrest.

This defense necessarily leads us to inquire what protection the common law affords to ministerial officers, and how far they are authorized to go in the performance of their public duties. * * *

Mr. Justice Foster says: "Ministers of justice while in the execution of their offices are under the peculiar protection of the law." Foster, 308. If an officer is killed while performing his duty, the law deems such killing murder of malice prepense.

This protection is not confined to the precise time when the officer is performing his official duty, but extends over him while going to, remaining at, and returning from the place of action. Any opposition, obstruction, or resistance intended to prevent an officer from doing his official duty is an indictable offense at common law, and the punishment is regulated by the nature of the offense.

An officer is authorized to summons as many persons as may be necessary to assist him in the performance of his legal duties, and such persons are bound to obey such summons, and they are under the same protection afforded to officers, as they are for the time officers of the law. The law imposes upon private persons the duty of suppressing affrays, preventing felonies from being committed in their presence, and arresting such offenders and bringing them to justice; and such private persons, while performing their duties, are under the protection of the law. We may confidently lay down the broad general principle that, when any person is performing a public duty required of him by law, he is under the protection of the law. An officer of the law who has legal process in his hands is bound to execute it according to the mandate of the writ. If he is resisted in the performance of this duty, he must overcome such resistance by the use of such force as may be necessary for him to execute his duty. If necessary, the law authorizes him to resort to extreme measures, and if the resisting party is killed in the struggle the homicide is justifiable. Garrett's Case, 60 N. C. 144, 84 Am. Dec. 359.[14]

[14] Accord: U. S. v. Jailer, 2 Abb. (U. S.) 265, 15 Fed. Cas. No. 15,463 (1867); Smith v. State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20 (1894); State of North Carolina v. Gosnell (C. C.) 74 Fed. 734 (1896); Lynn v. People, 170 Ill. 527, 48 N. E. 964 (1897). Contra, where arrest is for a misdemeanor: Stephens v. Commonwealth (Ky.) 47 S. W. 229 (1898).

If unnecessary and excessive force is used, after resistance has entirely ceased and the defendant in the writ has manifested his willingness to submit to the mandates of the law and be arrested, then, if the said defendant is killed, the officer will be guilty of manslaughter; and if the blood had time to cool, the killing would be murder. 2 Wharton, Crim. Law, 1030, 1031, and authorities referred to in note.[15] If, however, the defendant in the writ only ceases his resistance upon the officer desisting from his attempt to arrest, and still keeps himself in a condition to renew the resistance with a deadly weapon, if the officer should renew the effort to arrest, and the officer cannot make the arrest without great personal danger, he would be justified in killing the defendant.

The submission of the defendant in such a case is not complete, and as long as he refuses to be arrested he is in a state of resistance; and if he is armed with a deadly weapon, and has manifested an intent to use it, and still keeps the weapon in his possession convenient for an emergency, and the officer has reasonable grounds for believing that the weapon will be used if an arrest is attempted, the officer is not required to risk his life in a rencounter, or desist from an effort to perform his duty. When a person puts himself in an armed and deadly resistance to the process of the law, he becomes virtually an outlaw, and officers are not required to show him the courtesy of a chivalrous antagonist and give him an open field and fair fight. It is only when a criminal submits to the law that it throws round him the mantle of protection and administers justice with mercy. It is the duty of every offender charged with crime in due process of law to quietly yield himself up to public justice. State v. Bryant, 65 N. C. 327; State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359.

A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, if he resists: if no resistance is offered, the officer ought always, upon demand made, show his warrant to the party arrested or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of precaution. A defendant is bound to submit to a known officer; to yield himself immediately and peaceably into the custody of the officer before the law gives him the right of having the warrant read and explained, when in resistance the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the wrong. When a person acts in a public capacity as an officer, it will be presumed that he was rightfully appointed. 1 Wharton Cr. Law, §§ 1289, 2925; Cooley's Case, 6 Gray (Mass.) 350.

One who is not a known officer ought to show his warrant and read

[15] Accord: Gosse's Case, Vent. 216 (1673); State v. Rose, 112 Mo. 418, 44 S. W. 329 (1889).

it, if required; but it would seem that this duty is not so imperative as that a neglect of it would make him a trespasser ab initio, when there is proof that the party subject to be arrested had notice of the warrant, and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. Garrett's Case, supra.

The law, in its humanity and justice, will not allow unnecessary force to be used in the execution of its process. If a defendant, without any deadly weapon or manifestation of excessive violence, makes resistance, an officer is not justified in willfully shooting him down; but if a defendant has a deadly weapon, and has manifested a purpose to use it if an arrest is attempted, the officer is not bound to wait for him to have an opportunity of carrying his purpose into effect. If the warrant is for a misdemeanor, and a defendant attempts to avoid an arrest by flight, the officer has no right to shoot him down to prevent escape, nor even after an arrest has been made and defendant escapes from custody. Foster's Case, 1 Lew. Cr. Cas. 187.[16]

The rule is different in cases of felony. Bryant's Case, supra.[17]

If an officer has process in his hands issuing from a court of competent jurisdiction over the subject-matter, authorizing and commanding him to arrest a defendant, he is entitled to the protection which the laws afford officers acting under process, although the process in his hands is informal and irregular. If the process is illegal and void on its face, or is against the wrong person, or its execution is attempted out of the district in which it can alone be executed, then the officer would not be under the protection of the law;[18] but it would seem that, if he kills a resisting party under such circumstances, he would only be guilty of manslaughter, unless he had actual knowledge of his want of authority, or acted from express malice. * * *

The jury, after a retirement of two hours, found a verdict of "not guilty."[19]

[16] Accord: Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626 (1879); Handley v. State, 96 Ala. 48, 11 South. 322, 38 Am. St. Rep. 81 (1892); State v. Smith, 127 Iowa, 534, 103 N. W. 944, 70 L. R. A. 246, 109 Am. St. Rep. 402, 4 Ann. Cas. 758 (1905).

[17] Accord: Carr v. State, 43 Ark. 99 (1884).

[18] "A warrant issued before indictment must specify the offense charged, the authority under which it issues, the person who is to execute it, and the person to be arrested." Nisbit, J., in Brady v. Davis, 9 Ga. 73 (1850).

"By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him; * * * and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest." Gray, J., in West v. Cabell, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643 (1894). But see Bailey v. Wiggins, 5 Har. (Del.) 462, 60 Am. Dec. 650 (1854); Allen v. Leonard, 28 Iowa, 529 (1870); Tidball v. Williams, 2 Ariz. 50, 8 Pac. 351 (1885).

[19] In effecting an arrest without a warrant, for a felony, the person arresting, whether he be an officer or a private person, may use sufficient force to effect the arrest of the felon, even to the extent of taking life if necessary. 1 Hale, P. C. 587, 588; Conraddy v. People, 5 Parker, Cr. R. 234 (1862). Cf. Regina v. Murphy, 1 Cr. & Dix. 20 (1839).

In arresting upon suspicion of a felony, an officer (and, a fortiori, a private person) can only justify killing the person he seeks to arrest by proof that

SEMAYNE'S CASE.

(Court of King's Bench, 1604. 5 Coke, 91 a.)

In an action on the case by Peter Semayne, plaintiff, and Richard Gresham, defendant, * * * these points were resolved. * * * (3) In all cases when the king is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors; and that appears well by the Statute of Westm. I, c. 17 (which is but an affirmance of the common law), as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man), by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 Edw. II, Execut. 252, where it is said that the king's officer who comes to do execution, etc., may open the doors which are shut, and break them if he cannot have the keys, which proves, that he ought first to demand them. * * *[20]

the felony was actually committed by some one. Conraddy v. People, 5 Parker, Cr. R. 234 (1862). Cf. Reg. v. Dadson, 3 Car. & K. 148 (1850).

Since one arresting for a misdemeanor, with a warrant, cannot kill merely to effect the arrest, in arresting for such an offense without a warrant his rights are no greater.

"It is common learning that an officer may, without a precept, arrest any person he finds committing an offense. It is also well known that he must within a reasonable time, bring his prisoner before the proper court, or obtain a legal precept for detaining him. A failure to do so may make the officer a trespasser. Rev. St. c. 133, § 4. An officer, making an arrest upon a criminal charge, may also take from his prisoner the instruments of the crime and such other articles as may be of use as evidence upon the trial. These may not be confiscated or destroyed by the officer, however, without some order or judgment of a court. We do not find any authority or reason for the officer rendering any judgment in the matter. He holds the property, as he does the prisoner, to await and subject to the order of the court." Emery, J., in Thatcher v. Weeks, 79 Me. 548, 11 Atl. 599 (1887).

[20] Part of this case is omitted.

Accord: State v. Oliver, 2 Houst. (Del.) 585 (1855); State v. Mooring, 115 N. C. 709, 20 S. E. 182 (1894). Even though the occupant know the purpose for which the officer comes. Hall v. Hall, 6 Gill & J. (Md.) 386 (1834). But see Commonwealth v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510 (1876). The officer does not become a trespasser ab initio if the accused is in fact not in the house, even though he is notified of this fact by persons in the house. State v. Mooring, supra.

The officer need not inform the occupant who the person sought is, unless such information is demanded. Commonwealth v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510 (1876).

It seems that the right to break doors when the arrest is on a warrant extends to arrests for misdemeanors as well as felonies. State v. Shaw, 1 Root (Conn.) 134 (1789); State v. Mooring, supra. Contra: Commonwealth v. Supt. Co. Prison, 5 Pa. Dist. R. 635 (1896).

ARREST WITHOUT WARRANT.—Whether doors may be broken in the arrest

CHAPTER IV

EXTRADITION

STATE OF KENTUCKY v. DENNISON.

(Supreme Court of the United States, 1860. 24 How. 66, 16 L. Ed. 717.)

A motion was made in behalf of the state of Kentucky, by the direction and in the name of the Governor of the state, for a rule on the Governor of Ohio to show cause why a mandamus should not be issued by this court, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up, to be removed to the state of Kentucky, having jurisdiction of the crime with which he is charged.[1] * * *

Mr. Chief Justice TANEY delivered the opinion of the court. * * * This brings us to the examination of the clause of the Constitution which has given rise to this controversy. It is in the following words: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, "treason, felony, or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word "crime" of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called "misdemeanors," as well as treason and felony. 4 Bl. Com. 5, 6, and note 3, Wendall's edition.

But as the word "crime" would have included treason and felony, without specially mentioning those offenses, it seems to be supposed that the natural and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law and to the usage of nations, and regarded as offenses in every civilized community, and that they do not extend

of a felon, without a warrant, see 2 Hawk. P. C. c. 14; 1 Hale, P. C. 583; 4 Black. Comm. 292.

Since a court has no jurisdiction over foreign sovereigns, their ambassadors, diplomatic agents, and persons belonging to their suites, such persons are exempt from arrest. See Dupont v. Pichon, 4 Dall. 321, 1 L. Ed. 851 (1805); Musurus Bey v. Gadban, [1894] 1 Q. B. 533; Rev. St. §§ 4062–4065 (U. S. Comp. St. 1901, pp. 2760–2761).

[1] Part of this case is omitted.

to acts made offenses by local statutes growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the Governor of Ohio refused to deliver Lago, under the advice of the Attorney General of that state.

But this inference is founded upon an obvious mistake as to the purpose for which the words "treason and felony" were introduced. They were introduced for the purpose of guarding against any restriction of the word "crime," and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offenses were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offense. The policy of different nations, in this respect, with the opinions of eminent writers upon public law, are collected in Wheaton on the Law of Nations, 171, Fœlix, 312, and Martin (Verge's Ed.) 182. And the English government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its dominions. And as the states of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offenses against the sovereignty of the state, as well as all other crimes. And, as treason was also a "felony" (4 Bl. Com. 94), it was necessary to insert those words, to show in language that could not be mistaken, that political offenders were included in it. * * *

The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause new offenses created by a statute of the state, and growing out of its local institutions, and which are not admitted to be offenses in the state where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding state would probably draw one line, and the Governor of the other state another. And, if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the states, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill will. * * *

Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between states, and order and law within their respective borders, and to its early adoption by the colonies, and then by the confederated states, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible that this compact ingrafted in the Constitution included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and that it gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found; that the right given to "demand" implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled. * * *

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other state. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky is a judicial question to be decided by the courts of the state, and not by the executive authority of the state of Ohio.

The demand being thus made, the act of Congress declares that "it shall be the duty of the executive authority of the state" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding state. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several states bear to each other, the court is of opinion the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for, if it possessed this power, it might overload the officer with duties

which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state. * * *

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every state, for every state had an equal interest in the execution of a compact absolutely essential to their peace and well-being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled.[2]

In re MOHR.

(Supreme Court of Alabama, 1883. 73 Ala. 503. 49 Am. Rep. 63.)

SOMERVILLE, J.[3] The purpose of the present application is to vacate the action of the probate judge, discharging one Alexander Mohr from alleged illegal custody, on his petition for the writ of habeas corpus. The return to the writ showed that the petitioner was held in the custody of the relator, Frederick Gentner, as agent of the state of Pennsylvania, under a warrant of arrest issued by authority of the Governor of Alabama, pursuant to a requisition from the Governor of the former state, demanding his extradition as a fugitive from justice. The crime charged is that of obtaining goods by false pretenses. The probate judge permitted evidence to be introduced, showing that the prisoner was not in the state of Pennsylvania at the time of the commission of the alleged offense, and had never been there since; that the goods were obtained by purchase from an agent of the prosecutor in the state of New York, to whom the false representations, if any, were made; and that the petitioner had never fled from the state of Pennsylvania, and was not a fugitive from justice. It is claimed that the state courts have no jurisdiction of the case, and, if so, that the probate judge had no jurisdiction to go behind the warrant of the executive, to investigate the question as to whether or not the prisoner

[2] "The power to surrender fugitives, who, having committed offenses in a foreign country, have fled to this for shelter, belongs, under the Constitution of the United States, exclusively to the federal government." Taney, C. J., in Holmes v. Jennison, 39 U. S. 579, 10 L. Ed. 579 (1840).

[3] Part of this case is omitted.

was in fact a fugitive from justice, and that the proceedings before him were coram non judice and void. * * *

Is it permissible to show that the case is not one coming within the provisions of the Constitution and act of Congress, because the party charged is not a fugitive from justice, having committed the alleged offense, if at all, only constructively while outside of the territorial jurisdiction of the demanding state? Or are the papers in the case, in connection with the warrant of arrest issued by the Governor of this state, to be regarded as importing absolute verity in this particular, so as to be incapable of contradiction?

The statute provides that, if the return to the writ of habeas corpus shows that the petitioner is "in custody for any public offense, committed in any other state or territory, for which, by the Constitution and laws of the United States, he should be delivered up to the authority of such state or territory," he should be remanded. Code 1876, § 4957. This is, perhaps, merely declaratory of what the law would require in the absence of the statute. The power claimed by the prisoner is the right to show that his case is one outside of the class intended to be covered by the Constitution and laws of the United States.

The authorities are not in harmony as to what questions can be reviewed by habeas corpus in cases of extradition. It seems very certain that there is no power to go behind the indictment or affidavit, with the view of investigating the question of the prisoner's guilt or innocence. In re Clark, 9 Wend. (N. Y.) 212. He cannot be put upon trial for the crime with which he is charged, nor can any inquiry be made into either the merits of his defense, or mere formal defects in the charge. These inquiries are reserved for the courts of the demanding state, having jurisdiction of the offense. People v. Brady, 56 N. Y. 182; Robinson v. Flanders, 29 Ind. 10. Congress has seen fit to adopt special legislation regulating this phase of the evidence in the case. The act of 1793 makes conclusive the production of a copy of the indictment found, or an affidavit made before a magistrate of the demanding state, "charging the person demanded with having committed treason, felony, or other crime," certified as authentic by the Governor of such state. Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597). These papers, if in due form, are made conclusive evidence of the guilt of the accused, when assailed on habeas corpus. It may be considered, therefore, as the settled doctrine of the courts, that a prima facie case is made, when the return to the writ of habeas corpus shows: (1) A demand or requisition for the prisoner, made by the executive of another state, from which he is alleged to have fled; (2) a copy of the indictment found, or affidavit made before a magistrate, charging the alleged fugitive with the commission of the crime, certified as authentic by the executive of the state making the demand; (3) the warrant of the Governor authorizing the arrest. Where these facts are made to appear by papers regular on their face, there is a weight of authority holding that the prisoner is prima facie under legal

restraint. Spear's Law of Extrad. 208–303; Matter of Clark, 9 Wend. (N. Y.) 212; State v. Schlemn, 4 Har. (Del.) 577; In re Hooper, 52 Wis. 699, 58 N. W. 741; People v. Brady, 56 N. Y. 182; Bump's Notes of Const. Dec. 295–297; Johnston v. Riley, 13 Ga. 97.

Many of the cases hold that the warrant of the Governor, reciting these jurisdictional facts, is itself prima facie sufficient to show that all the necessary prerequisites have been complied with prior to its issue by him, although as to this proposition there is a conflict of opinion. Davis' Case, 122 Mass. 324; Kingsbury's Case, 106 Mass. 223; Robinson v. Flanders, 29 Ind. 10; Hartman v. Aveline, 63 Ind. 344, 30 Am. Rep. 217. Which of these is the correct view we need not decide, as all the proper papers in due form are set out in the return made to the writ by the respondent, Gentner, who is the relator in this proceeding.

It is obvious that the extradition clause of the federal Constitution has reference only to a specified class, and not to all criminals. Its language is: A person charged with any crime "who shall flee from justice and be found in another state." Article 4, § 2. The act of Congress is more emphatic, if possible, in describing such person as an actual fugitive, characterizing him as one who "has fled," and the state in which he is found as the state to which he "has fled." Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597). It may be considered clear, therefore, without any conflict of authority, that the Constitution and laws of Congress do not provide for the extradition of any persons except those who may have fled from or left the demanding state as fugitives from the justice of that state. Whart. Cr. Pl. & Pr. (8th Ed.) 31, and cases cited; Spear's Law of Extrad. 273, 310–316. "The offense," says Mr. Cooley, "must have been actually committed within the state making the demand, and the accused must have fled therefrom." Cooley's Const. Lim. (5th Ed.) 16, note 1.

There is a difference of opinion as to what must be the exact nature of this flight on the part of the criminal, but the better view, perhaps, is that any person is a fugitive, within the purview of the Constitution, "who goes into a state, commits a crime, and then returns home." Kingsbury's Case, 106 Mass. 223; Hurd on Hab. Corp. 606. In the Case of Voorhees, 32 N. J. Law, 141, he was characterized as one "who commits a crime in a state, and withdraws himself from such jurisdiction." This point, however, we need not decide, as it is shown that the prisoner, Mohr, has never been into the jurisdiction of the demanding state since the commission of the alleged crime. He cannot, therefore, be said to be a fugitive from the justice of that state.

It is clear to our mind that crimes, which are not actually, but are only constructively, committed within the jurisdiction of the demanding state, do not fall within the class of cases intended to be embraced by the Constitution or act of Congress. Such at least is the rule, unless the criminal afterwards goes into such state and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that

no one can in any sense be alleged to have "fled" from a state, into the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. And only this class of persons are embraced within either the letter or spirit of the Constitution, the purpose of which was to make the extradition of fugitive criminals a matter of duty, instead of mere comity between the states. The language of the Constitution and the law of Congress are entirely free from ambiguity on this point, being too obvious to admit of judicial construction; and the authorities are uniform in adoption of this view as to its manifest meaning. Whart. Cr. Pl. & Pr. (8th Ed.) § 31; Spear's Law of Extrad. 309–316; Voorhees' Case, 32 N. J. Law, 147; Kingsbury's Case, 106 Mass. 223; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; Wilcox v. Nolze, 34 Ohio St. 520.

We are of opinion that it was never intended by Congress, in their enactment of the law of 1793, that the finding of the Governor of a state that one is a fugitive from justice should be conclusive evidence of that fact, incapable of contradiction by facts showing the contrary. It is an important feature of the law, throwing some light upon its proper construction, that while it expressly prescribes the mode by which evidence of the crime charged shall be authenticated, it nowhere prescribes how the fact that he is a fugitive from justice shall be established. There seems to us to have been a good and sufficient reason for this distinction. Nothing was more proper than the policy of precluding the fugitive from disputing the certified records from the courts of a sister state, in view of the constitutional requirement that "full faith and credit" shall be given in each state to "the records and judicial proceedings of every other state." Const. U. S. art. 4, § 1.

But no such reason applies to the implication of the defendant's being a fugitive, because he is found in another state than the one in whose courts the charge is pending. It may be asserted that it was within the power of the Governor to investigate this fact before he issued the warrant, so as to satisfy himself of its truth. Perhaps this is the correct view; but this duty must, in its very nature, be discretionary. In practice, the fact of the criminal's flight is usually shown by affidavit; but this cannot be regarded as conclusive upon any principle known to us, in the absence of statutory regulation so declaring the law. The better view seems to us to be that one of the purposes of pretermitting express congressional legislation on this point was to refer the matter to executive determination, subject to review by habeas corpus in the courts in all proper cases. The papers being regular, the Governor has a right to suppose that a prima facie case exists for a warrant, and the safer practice would seem to be that the accused should be remitted to the courts to establish matters of defense aliunde the record. Especially is this true in doubtful cases.

As we have said, the grounds of imprisonment in this class of cases are constantly reviewed by habeas corpus, in the state courts. Whart. Cr. Pl. & Pr. § 35. It is just as material to show that the prisoner

does not come within the law, on the ground that he has never fled from the demanding state, as on the ground that he is not the identical person intended to be indicted, or that there is no authenticated copy of the indictment, or other charge against him. All of these facts must concur, before the law authorizes the requisition to be made, or the warrant of arrest to issue. They are jurisdictional facts, in the absence of which the prisoner is excluded from the operation and influence of the law, and no extradition can be constitutionally authorized by congressional legislation. Whart. Cr. Pl. & Pr. (8th Ed.) §§ 31, 34, 35.

This view is supported by the best-considered cases, and parol evidence has been often admitted by the courts, in proceedings by habeas corpus, for the purpose of showing that the warrant of the Governor was improvidently issued under the mistaken belief that the prisoner was a fugitive. * * *

We are of opinion that the probate judge did not err in discharging the petitioner, and that it was competent for him to hear oral evidence, in order to establish the fact that the petitioner was not a fugitive from justice.

Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of habeas corpus, which has often been characterized as the great writ of liberty, and may be regarded, not less than the right of trial by jury, as one of the chief corner stones in the structure of our judiciary system. It might justly be considered as alarming to announce that a writ, which has so frequently been used for centuries past to prevent the encroachment of kings upon popular liberty, is inadequate for the just purpose for which it has been invoked in this case.

The application made by the relator must be denied.[4]

BRICKELL, C. J., dissents.

[4] See, also, Illinois v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121 (1907).

"Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purpose of the preliminary examination unless palpably erroneous in law." Fuller, C. J., in Ornelas v. Ruiz, 161 U. S. 509, 16 Sup. Ct. 691, 40 L. Ed. 784 (1896).

"It is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another." Matthews, J., in Roberts v. Reilly, 116 U. S. 97, 6 Sup. Ct. 300, 29 L. Ed. 544 (1885).

Before the fugitive can be lawfully delivered up, it must appear in the proceedings for extradition that he has been charged with the commission of the crime either by indictment or affidavit. Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597). A charge by information is not sufficient. Ex parte Hart,

CHAPTER V

PROCEEDINGS BEFORE MAGISTRATE

WINDHAM v. CLERE.

(Court of Queen's Bench, 1588. Cro. Eliz. 130.)

Action upon the case. And declares, that the defendant was a justice of peace in the county of N. And whereas the plaintiff was a loyal subject, etc. the defendant maliciously intending to deprive him of his good name and fame, did direct his warrant, and shews it in certainty, etc. to divers constables to attach him; alleging he was accused of the stealing of the horse of A. B. by reason whereof he was arrested, till he put in bond to appear, etc. ubi revera he was never accused, nor did steal the horse, and the defendant did know him to be guiltless; by reason whereof he was greatly discredited. Upon non culp' pleaded, it was found for the plaintiff. And it was held by CLENCH and GAWDY, the action was maintainable. If a man be accused to a justice of peace for an offense, for which he causes him to be arrested by his warrant, although the accusation be false, yet he is excusable; but if the party be never accused, but the justice of his malice and own head cause him to be arrested, it is otherwise. And they commanded judgment to be given for the plaintiff. 14 Hen. VIII.

BLODGETT v. RACE.

(Supreme Court of New York, 1879. 18 Hun, 132.)

BOCKES, J.[1] A complaint in writing, charging a criminal offense, although on information and belief only as to the person suspected of having committed it, is sufficient to authorize an investigation before a magistrate by the examination of witnesses. The magistrate on such complaint may issue subpœnas for witnesses, and has jurisdiction of the subject-matter of the offence charged to have been committed, and may compel the attendance of witnesses by attachment in case of disobedience of the subpœna. People v. Hicks, 15 Barb. 153.

63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801 (1894). Contra: In re Hooper, 52 Wis. 699, 58 N. W. 741 (1881).

One convicted of an offense against a state, who before the expiration of his sentence is delivered to the federal authorities to serve out a prior sentence, is, at the end of that sentence, a "fugitive from justice," and can be taken by the state. People v. Benham, 71 Misc. Rep. 345, 128 N. Y. Supp. 610 (1911).

1 The statement of facts is omitted.

But before a warrant can lawfully issue for the arrest of the offender the magistrate must have some evidence of his guilt. Facts and circumstances, stated on information and belief only, without giving any sufficient grounds on which to base the belief, are insufficient to confer jurisdiction as to the person. The magistrate must have evidence of probable cause, both as to the commission of the offense and the guilt of the offender, before he can have jurisdiction to cause the arrest. Comfort v. Fulton, 39 Barb. 56; Vredenburgh v. Hendricks, 17 Barb. 179; Wilson v. Robinson, 6 How. Prac. 110; Pratt v. Bogardus, 49 Barb. 89; People v. Hicks, 15 Barb. 153; Wells v. Sisson, 14 Hun, 267; Carl v. Ayers, 53 N. Y. 14. It is laid down in Waterman's Notes to Archbold's Criminal Practice and Pleadings (vol. 1, 20, marginal page 31) that a warrant cannot be issued against one, if his guilt appears only from hearsay and mere rumor, but that a case of probable guilt, on the part of the accused, must be made out. If facts and circumstances be stated, sufficient to call for judicial determination, the magistrate will be protected in his action, and this, although he might err in judgment. In such case he is to be fully protected and the error can only be made available on writ of error or appeal in the action, or proceeding in which the error occurred.

As to the case in hand, it seems that the warrant was issued on less proof even than information or belief as regards the plaintiff. It was issued on an allegation only of "suspicion and belief" as to the plaintiff's guilt. No fact or circumstance whatever was stated to support the suspicion, even much less to support a conclusion of probable cause against him. The warrant was without jurisdiction, hence afforded the defendant no protection against the charge of an illegal arrest. It is not necessary here to hold that the defendant had no ground for committing the plaintiff after the open public examination was had. It is quite possible, and I think it must be assumed, that there was sufficient evidence given before him to uphold his conclusion to commit. But we do not pass upon that question here. The original arrest, directed by the defendant, was unauthorized, and the nonsuit herein was therefore improperly granted. This conclusion renders it unnecessary to examine other questions raised in the case. Perhaps it should be further remarked that the case, as presented on this appeal, does not appear to be one of serious enormity. The good faith of the defendant, in issuing the warrant, is not denied. The plaintiff was in no way seriously oppressed; on the contrary, was allowed great liberty after his arrest, and during the examination, and finally submitted to be committed, rather than give bail, which it seems was easily to be obtained. Whether or not the plaintiff may recover more than nominal damages is for a jury to determine. The order appealed from denying a new trial must be reversed.

LEARNED, P. J., and BOARDMAN, J., concurred.

SCAVAGE v. TATEHAM.

(Court of Common Pleas, 1601. Cro. Eliz. 829.)

False imprisonment in London from the 10th September unto the 29th September. The defendant justifies, for that he was mayor and justice of peace in Pomfrait, and that robbery was done there, and the plaintiff was thereof suspected, and brought before him; et quia videbatur suspectuosus, he detained him in his house during that time in the declaration mentioned, to examine him and one Pole, who was not apprehended, concerning the said robbery; and afterwards, upon the 29th September, delivered him over to the new mayor; and traverseth the imprisonment in London.

And it was thereupon demurred; and adjudged, that the inducement to the traverse was not good; for a justice of peace cannot detain a person suspected in prison but during a convenient time, only to examine him, which the law intends to be three days, and within that time to take his examination, and send him to prison; for he ought not to detain him as long as he pleaseth, as he here did eighteen days; neither ought he to detain him in prison in his own house, but he is to commit him to the common gaol of the county; for otherwise, when the justices come to deliver the gaol, he is not in the gaol, and may not be delivered, and so should lie longer than is reasonable. Vide St. 5 Hen. IV, c. 10; 2 Edw. IV, c. 8. And here he took not any examination, but delivered him over to the new mayor without examination, which was not lawful. And therefore it was adjudged for the plaintiff.

CHARGE TO THE GRAND JURY.

(Somersetshire Assizes, 1849. 2 Car. & K. 845.)

At the Taunton assizes, April 2, 1849, Lord DENMAN, C. J., in his charge to the grand jury, said:

In all cases in which prisoners charged with felony have witnesses, and those witnesses are in attendance at the time of the examination before the magistrate, I should recommend that the magistrate should hear the evidence of such witnesses as the prisoner, on being asked, wishes to be examined in his defense. If such witnesses merely explain what has been proved in support of the charge, and are believed, they will actually have made out a defense on behalf of the accused, and there would of course be no necessity for any further proceedings; but if the witnesses so called contradict those for the prosecution in material points, then the case would be properly sent to a jury to ascertain the truth of the statements of each party; and the depositions of the prisoner's witnesses being taken and signed by them, should be transmitted to the judge, together with the depositions in support of the charge.

CHAPTER VI

BAIL

REX v. PEPPER.

(Court of King's Bench, 1684. Comberbach, 298.)

CUR. We are not bound to bail a man committed for suspicion of murder, where 'tis express'd that a man was killed (no, tho' coroner's inquest find it but manslaughter) but we ought to have the examinations before us, and if it appear to be a case of hardship we may bail.

REX v. JUDD.

(Court of King's Bench, 1788. 2 Term R. 255.)

The defendant was brought up on this day by a writ of habeas corpus, from Hertford, in order to be bailed.[1] * * *

ASHHURST, J. However improper the defendant's conduct appears to have been upon the proceedings before the justices, yet unless it appears, upon the face of the commitment itself, that the defendant is charged with a felony, we are bound by the habeas corpus act to discharge him; taking such bail for his appearance to take his trial as we in our discretion shall think fit, according to the circumstances of the case. And therefore the question is, whether there is specified in this commitment such an offense as amounts to felony? It is admitted that neither of the two first charges in the commitment amounts to felony. With respect to the last charge, it is not that the defendant was an accessory with Rand in feloniously, but only with willfully and maliciously, setting fire to a parcel of unthreshed wheat. And though it is not necessary that the word "feloniously" should be used in the commitment, yet it ought to appear on the facts stated to be in law a felony, and within the description of the act. Now the statute has only made it felony to set fire to a cock, mow, or stack, of corn; and the defendant is not charged with either of these. Whatever words the Legislature used, we must suppose that they knew the meaning of them; and if a justice uses the same words, we are bound to suppose that he intended them in the same sense; but if he makes use of other words, he must be more precise.

Now here a parcel of corn is too indefinite a description. It does not come within the description of the act, and we cannot say how much it is. Twenty ears of wheat is a parcel. Therefore I am of opinion that, as the warrant of commitment does not charge the defendant with a felony, we are bound to bail him. With regard to the quan-

[1] Part of the statement of facts and the opinion of Grose, J., are omitted.

tum of the bail, although the nature of the defendant's crime is not very accurately stated, yet as sufficient appears on the depositions, returned with the commitment, to shew that he has at least been guilty of an enormous offense, I think we ought to take ample security for his appearance; and that he himself should be bound in £1,000. and four sureties in £500. each.

REX v. KIMBERLEY.

(Court of King's Bench, 1729. 2 Strange, 848.)

The defendant was brought up by habeas corpus, being committed to Woodstreet-Counter, for feloniously marrying Bridget Reading, contrary to an Irish act of Parliament, 6 Anne, in order to be transmitted to Ireland to be tried, the offense being committed there.

Strange moved that he might be discharged or bailed, insisting that justices of the peace in England are confined to act only as to such offenses as are against the laws of England, and committed in England; and the proviso in the habeas corpus act gives no power as to offenses in Ireland, but leaves it on the former practice.

Sed PER CURIAM. It has been done in Colonel Lundy's Case, 2 Ven. 314, and in 3 Keb. 785, the court refused to bail a man committed for a murder in Portugal. If application is not made to have him sent over in a reasonable time, you may apply again.

Thereupon the defendant was remanded, and upon application to the Secretary of State, it was referred to Mr. Attorney General, to consider of the manner of sending him over; and upon an attendance by counsel, Mr. Attorney reported, that he might be taken from the Counter by a messenger, who should have a warrant to carry him to Ireland, whither he was carried, tried, condemned, and executed.

REX v. WYNDHAM.

(Court of King's Bench, 1715. 1 Strange, 2.)

The defendant Sir William Wyndham being brought up by the lieutenant of the Tower, Serjeant Pengelly, Mr. Jeffries, Mr. Reeve and Mr. Hungerford moved that he might be admitted to bail, and offered several arguments to induce the court to bail him, which, with the answers given thereto by Sir Joseph Jekyll, Mr. Attorney and Solicitor, are comprised in the opinion of the court, which was delivered the last day of the term, ut sequitur:

PARKER, C. J.[2] This is a commitment by the Secretary of State for high treason generally. * * *

[2] Part of this case is omitted.

The next thing relied upon is the illness of Sir William Wyndham, which appears to be a distemper incident to the family. We are of opinion, that this is not ground enough singly, to induce the court to admit Sir William to bail; for it must be a present indisposition, arising from the confinement; and so we held this term in the Case of Mr. Harvey of Combe, who stabbed himself after his examination; and was refused to be bailed, because his illness was from an act of his own. But I shall not enlarge upon this head, since we are all of opinion Sir William Wyndham ought to be bailed. There have been four terms passed since his commitment, and one assizes in Somersetshire, out of which county it has been hinted the ground of the complaint against Sir William Wyndham arises; and therefore, there being no prosecution against him, he must be admitted to bail, himself in £10,000. and four sureties in £5,000. each.

REGINA v. RIDPATH.

(Court of Queen's Bench, 1713. 10 Mod. 152.)

A recognizance was entered into by Ridpath, with securities, whereby he was bound to appear the first day of the term ad respondendum, etc., in the meantime to his good behavior, and not to depart without the license of the court.

An information was preferred against him by the Attorney General; to which information, by reason of some defect in the pleading, the Attorney General thought fit to enter a nolle prosequi, and then the Attorney General exhibited another.

It was insisted in favor of Ridpath and his securities:

First. That the words "ad respondendum" must be extended to those crimes only, the suspicion of which was the cause of his commitment and entering into the recognizance, and not to the crimes he should afterwards commit, or be charged with; for then it would be utterly impossible for a man to get anybody to be bound in a recognizance with him; an opinion of the innocence of the person, as to the crime charged, being probably the only motive that can be sufficient to induce men to become bound for others.

Secondly. That "ad respondendum" refers to the first day of the term, when he was bound to appear.

Thirdly. That the entering of a nolle prosequi was a bar to the offense contained in the information; at least that it was a discharge from any further prosecution for it; and that it was all one, whether he was discharged from the recognizance by rule of court made for that purpose, or by a judgment, that by a necessary consequence amounted to a discharge.

But THE COURT were of opinion, that the recognizance extended to all crimes whatever which he should be charged with; and that if it had relation to any particular crime only, it must be mentioned in the

recognizance; but that is only "ad respondendum" generally. That there was no such inconvenience as was pretended; the bail in this case being bound in a sum certain, and not to stand in the place of the principal, as in civil cases; that the person's not appearing according to his recognizance, his absence (be the cause or reason of it what it will) was the cause of the forfeiture of the recognizance. That anciently in special bail in civil actions, where the bail is to stand in the place of the principal, bail to one action was to stand bail to all actions that he should be charged with when in court. That this was hard in case of special bail, and is therefore now altered, though altered only by rule of court; and that as to common bail the law is still the same. That the nolle prosequi was neither a bar nor discharge.[3]

[3] Accord: State v. Randolph, 22 Mo. 474 (1856); People v. Gillman, 125 N. Y. 372, 26 N. E. 469 (1891). Cf. State v. Bryant, 55 Iowa, 451, 8 N. W. 303 (1881).

So, where the recognizance specifies the offense for which the accused is to appear and answer, if it also provides that the defendant shall not depart without leave, it is not an answer to say that the defendant might have obtained his discharge from the court, either because nothing was alleged against him by indictment, or because he was not indicted for the same offense as that upon which he had been bound over. Commonwealth v. Teevens, 143 Mass. 210, 9 N. E. 524, 58 Am. Rep. 131 (1887). Or that the grand jury had returned "no bill." State v. Fitch, 2 Nott & McC. (S. C.) 558 (1820). Or that the accused had previously been acquitted on an indictment for the same offense. Archer v. Commonwealth, 10 Grat. (Va.) 627 (1854). Or even that he had been tried and found not guilty. An order of the court discharging him is requisite. State v. Stout, 11 N. J. Law, 124 (1829).

If the recognizance is only for an appearance at the next term of the court, bail are discharged when they produce the defendant at that term, and the court cannot, against the express dissent of the bail, respite the recognizance to a subsequent term. People v. Clary & Fleming, 17 Wend. (N. Y.) 374 (1837); Keefhaver v. Commonwealth, 2 Pen. & W. (Pa.) 240 (1830). If, after a recognizance is entered into, the accused is arrested on a bench warrant issued upon an indictment for the same offense and he subsequently escapes, his bail are discharged. People v. Stager, 10 Wend. (N. Y.) 431 (1833).

If the recognizors undertake to produce the accused to answer a specific charge, his failure to appear and answer a different charge is not a breach of the undertaking. Gresham v. State, 48 Ala. 625 (1872). Statutes now provide that the undertaking is forfeited by failure of the defendant to appear, although the offense is incorrectly described in the undertaking. In Gresham v. State, supra, it was held that such a statute applied only to such misdescriptions as nevertheless apprise the parties of the nature of the offense for which the indictment is to be preferred, and to cases in which the indictment embraces the particular offense mentioned in the undertaking. It is no defense to an action on the recognizance that the defendant could not be produced because of the fact that he was at the time imprisoned in another state for an offense committed there. Devine v. State, 5 Sneed (Tenn.) 623 (1858). See, also, Cain v. State, 55 Ala. 170 (1876); State v. Horn, 70 Mo. 466, 35 Am. Rep. 437 (1879); Yarbrough v. Commonwealth, 89 Ky. 151, 12 S. W. 143, 25 Am. St. Rep. 524 (1889); King v. State, 18 Neb. 375, 25 N. W. 519 (1885). But where the bail allow the accused to go into another state and while there he is, after the forfeiture of the recognizance, delivered on the requisition of the Governor of a third state for a crime committed (without the knowledge of the bail) in said state, and is imprisoned in such state on conviction, the bail are not discharged from liability on their recognizance in a suit by the state where the accused was first arrested. Taylor v. Taintor, 16 Wall. 346, 21 L. Ed. 287 (1872). Where the condition of the recognizance becomes impossible by the act of God or of the law, or of the obligee, the default is excused; hence

CHAPTER VII

THE GRAND JURY

The sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which on the part of our lord the king shall then and there be commanded them. They ought to be freeholders, but to what amount is uncertain; which seems to be casus omissus, and as proper to be supplied by the Legislature as the qualifications of the petit jury, which were formerly equally vague and uncertain, but are now settled by several acts of Parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority, which number, as well as the constitution itself, we find exactly described so early as the laws of King Ethelred: "Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare." * * *

The grand jury are sworn to inquire only for the body of the county, pro corpore comitatus; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of Parliament.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill "Ignoramus," or, "We know nothing of it," intimating that, though the facts might possibly be true, that truth did not appear to them; but now they assert in English more absolutely "Not a true bill," or (which is the better way) "Not found," and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then indorse upon it "A true bill," anciently "Billa vera." The indictment is then said to be found, and the party stands indicted. But to find a bill there must be at least twelve of the jury agree, for so tender is the law of England of the

the death of the accused (Merritt v. Thompson, 1 Hilt. [N. Y.] 550 [1858]), or his imprisonment at the date of appearance by authority of the state (People v. Bartlett, 3 Hill [N. Y.] 570 [1842]), excuses the bail; but sickness of the accused (State v. Edwards, 4 Humph. [Tenn.] 226 [1843]; Piercy v. People, 10 Ill. App. 219 [1881]. [Contra: People v. Tubbs, 37 N. Y. 586 (1868)]), or his insanity (Adler v. State, 35 Ark. 517, 37 Am. Rep. 48 [1880]) has been held not to be such an act of God as will excuse the bail.

lives of the subjects, that no man can be convicted at the suit of the king of any capital offense, unless by the unanimous voice of twenty-four of his equals and neighbors; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree; and the indictment, when so found, is publicly delivered into court.

4 Black. Comm. 302 et seq.

ANONYMOUS.

(Court of King's Bench, 1352. 27 Liber Assisarum, pl. 63.)

One G. was indicted in the King's Bench for that being one of the enditors that indicted certain persons of divers felonies, they sued him for betraying the counsel of the King, for that he had openly shown to others what things the said persons were indicted for, and thus betrayed the counsel of the King. For this he was arraigned as of felony. And Shardelow—some judges would hold it treason, but he was arraigned only of felony, and was acquitted. Quære, what would have been the judgment if he had been convicted? [1]

REGINA v. RUSSELL.

(Central Criminal Court, 1842. Car. & M. 247.)

The prisoner was indicted for feloniously assaulting ——— Abraham on the 21st of December, and cutting and wounding him on his head, left eyebrow, and nose, with intent to do him some grievous bodily harm.

The prosecutor and several of the witnesses for the prosecution were Lascars, and C. Phillips, before the jury were charged, intimated to the judges that there was some doubt as to whether those witnesses had been properly sworn to give evidence before the grand jury.

GURNEY, B., and WIGHTMAN, J., were both of opinion that that was a matter which they ought not to inquire into, and also that the mode of swearing the witnesses to go before the grand jury would not, if incorrect, vitiate the indictment, as the grand jury were at

[1] A grand juror may be called upon to testify what the evidence was before the grand jury. Crocker v. State, Meigs (Tenn.) 127 (1838); Gordon v. Commonwealth, 92 Pa. 216, 37 Am. Rep. 672 (1879). Also to prove that a certain witness did not testify before the grand jury. Commonwealth v. Hill, 11 Cush. (Mass.) 137 (1853). Or to prove what persons were examined before the grand jury. Ex parte Schmidt, 71 Cal. 212, 12 Pac. 302 (1886). A fortiori, a witness may testify as to what he stated before the grand jury. Reg. v. Gibson, Car. & M. 672 (1842). Or one witness may testify as to what another witness so stated. Reg. v. Hughes, 1 Car. & K. 520 (1844).

liberty to find a bill upon their own knowledge merely, and were anciently in the habit of doing so. And WIGHTMAN, J., added that the same point had arisen lately on the Northern circuit, before Lord Denman and himself, and they, after considering the subject, were of the same opinion as had been expressed to-day.

The trial proceeded, and the prosecutor and such witnesses as were Lascars having been sworn in the manner which they considered binding—

The prisoner was eventually convicted of an assault, and sentenced to be imprisoned for eight days.[2]

STATE v. SEABORN.

(Supreme Court of North Carolina, 1833. 15 N. C. 305.)

RUFFIN, C. J.[3] * * * The second objection to the grand jury is that in the record one Joel Jones is named as one of the grand jurors sworn, while the list returned contained no such person, but one of the name of Joes Jones. This differs from the former objection in this: That here the facts which it is alleged constitute the error do appear in the record; whereas the first error was supposed to consist in the silence of the record upon certain facts. It is insisted that the grand jury must be composed only of those summoned, and that if one be impaneled on it by a different name from all those summoned,

[2] Accord: State v. Wilcox, 104 N. C. 847, 10 S. E. 453 (1889); State v. Lee, 87 Tenn. 114, 9 S. W. 425 (1888); State v. Terry, 30 Mo. 368 (1860); Commonwealth v. Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302 (1893).

While there must be legal and competent evidence before the grand jury to sustain an indictment (People v. Lauder, 82 Mich. 109, 46 N. W. 956 [1890]), the authorities generally agree that an indictment is not vitiated merely because the grand jury examined incompetent witnesses (State v. Wolcott, 21 Conn. 272 [1851]; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270 [1850]; Bloomer v. State, 3 Sneed [Tenn.] 66 [1855]), or considered improper evidence (Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460 [1881]; State v. Logan, 1 Nev. 509 [1865]), or required a witness to give improper evidence, e. g., to testify against himself (People v. Lauder, 82 Mich. 109, 46 N. W. 956 [1890]. [Contra: State v. Froiseth, 16 Minn. 296, Gil. 260 (1871).]) The sufficiency of the evidence before the grand jury will not be inquired into (Stewart v. State, 24 Ind. 142 [1865]; United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134 [1852]), at least if it appear that there was any legally competent evidence before them (Washington v. State, 63 Ala. 189 [1879]; State v. Logan, 1 Nev. 509 [1865]).

In the absence of statutory provisions, it is no objection to the validity of an indictment that one or more of the grand jurors, who were otherwise qualified, had formed or expressed an opinion of the guilt of the accused before the finding of the indictment. Tucker's Case, 8 Mass. 286 (1811); State v. Chairs, 9 Baxt. (Tenn.) 196 (1877). Or that one or more of the jurors were biased or had an interest (not pecuniary) in the case. Commonwealth v. Brown, 147 Mass. 585, 18 N. E. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736 (1888); State v. Rickey, 10 N. J. Law, 83 (1828); Commonwealth v. Strother, 1 Va. Cas. 186 (1811). Or was of kin to the accused or to the prosecutor. State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818 (1884); State v. Russell, 90 Iowa, 569, 58 N. W. 915, 28 L. R. A. 195 (1894). The general qualifications for grand jurors are very generally provided for by statute.

[3] Part of this case is omitted

he must be taken to be a different person, and the bill is not well found.

This objection, if founded in fact and taken in due season in the superior court, would, in my opinion, have been unanswerable; and had it then been overruled, it would have been error. But this I am saying as a mere dictum; for, admitting the exception to have been once sufficient, the question remains whether the case was open to it when it was actually taken, which is the point of the present decision.

I do not find that it is yet settled in England whether an exception to a grand juror can be taken after verdict, or even after plea to the felony. Perhaps the unequivocal terms of St. 11 Hen. IV, 9, may make it imperative on the court to receive it at any time; since, if well founded, it avoids the indictment ab initio "with all the dependence thereof," which includes, as some suppose, the prisoner's plea in chief and "the verdict." Yet others have held that, although the proceedings be void under the statute, the matter of avoidance must be brought before the court at a proper and at an early stage, namely, before the bill found, by challenge, or by special plea upon arraignment, with a plea over to the felony either then or upon the overruling of the first plea. To that effect is the great authority of Lord Coke (3 Inst. 33, 34); and in Bacon's Abridgment, Juries, A, this is said to be the better opinion. But Serjeant Hawkins afterwards remarks (book 2, c. 25, §§ 23, 26, 27) that it seems yet doubtful how far advantage can be taken of the disqualification of a grand juror after trial. Whatever may be the correctness of this doubt, it is manifest that it depends upon that statute and has no other foundation.

There is nothing to ground it on in this state. The statute of Henry IV is not in force here, because we have legislated for ourselves upon this subject, and have established by many acts a complete system of our own, inconsistent in many respects with that of England. I do not think it necessary to recite our statutes, and content myself with a reference to them. They are the acts of 1779, c. 137, of 1806, c. 693, § 11, and c. 694, of 1807, c. 712, and of 1810, c. 801. A perusal of them must satisfy any mind that all these statutes are directory in their nature. There is not an annulling clause or word in any one of them; and from many of the provisions it must be deduced that no such consequences of an irregularity were intended. If we advert, for instance, to the very particular directions of St. 1806, c. 694, relative to the forming of the jury lists from the tax list, to be furnished by the clerk of the county court; to the writing the names on scrolls of equal size; to the putting them in a box having a certain number of divisions, marks, locks and keys; to the locking the box, the custody of the keys and of the box; and to the drawing of the names by a child under a certain age—when, I say, we advert to these provisions, and also recollect that many of the matters can by no method get into the record of the superior court, and that the statute contemplates that no part of them will get there, by communication from the county court, except the list of jurors to be summoned, that is, the result of

all the previous ceremonies, the impression on the mind must amount to conviction that the enactments are merely directory, and, if so, that others upon the same subject in the same statute, or in another statute in pari materia, partake of the same character.

But the prevailing consideration is the want of any words importing that the proceeding shall be void, if the directions of the acts be not strictly observed. Upon this ground McEntire's Case, 4 N. C. 267, was decided, and ruled that in this state exceptions to grand jurors must be taken at a period analogous to that for excepting to a petit juror; that is, at the earliest point of time the party could. That to a petit juror must be by challenge when tendered, as has long been settled at common law, and was also here under the same act of 1779 in Oldham's Case, 2 N. C. 450. In strictness, so ought a grand juror to be challenged before he is sworn. Thus it was at common law, and there our acts still leave the case. That was the course, I recollect, in Burr's trial; and the case cited from 9 Mass. 107, Commonwealth v. Smith, rules that, upon a statute of that state, similar to ours, no plea of an irregularity in impaneling the grand jury could be received. But it seems to be agreed in McEntire's Case that the objection may be by plea upon the arraignment; and to that I would adhere, as a fair and convenient method. But I think all objections of the sort are precluded by a plea to the felony. * * *

I am therefore of opinion that both of the objections taken in the first reason in arrest are insufficient and must be overruled. * * *[4]

[4] Some courts hold that, if accused was in a position to object by challenge either to the array or to a juror, his neglect to challenge on the organization of the jury is a waiver, and he cannot afterward object by motion to quash or by plea in abatement. Musick v. People, 40 Ill. 268 (1866); McClary v. State, 75 Ind. 260 (1881); Fisher v. State, 93 Ga. 309, 20 S. E. 329 (1893). But if he had no opportunity to challenge he may plead in abatement any matter which was sufficient cause of challenge. Pointer v. State, 89 Ind. 255 (1883). Others hold that the accused may except on arraignment. State v. Rockafellow, 6 N. J. Law, 332 (1796); Newman v. State, 14 Wis. 393 (1861). It is too late after verdict (People v. Robinson, 2 Parker, Cr. R. 235 [1855]), or after pleading in bar (State v. Carver, 49 Me. 588, 77 Am. Dec. 275 [1861]; Pointer v. State, 89 Ind. 255 [1883]; State v. Heffernan, 28 R. I. 477, 68 Atl. 364 [1907]), to object to the incompetency of the grand jury.

CHAPTER VIII

THE INDICTMENT

SECTION 1.—FORM AND REQUISITES OF THE INDICTMENT IN GENERAL

I. The Caption

Touching the forms of indictments, there are two things considerable:

1. The caption of the indictment.
2. The indictment itself.

The caption of the indictment is no part of the indictment itself, but it is the style or preamble, or return that is made from an inferior court to a superior, from whence a certiorari issues to remove. * * *

1. The name of the county must be in the margin of the record, or repeated in the body of the caption.
2. The court where the presentment is made must be expressed. * * *
3. It must appear where the session was held, and that the place where it was held is within the extent of the commission. * * *
4. The justices' names. * * *
5. The title of their authority. * * *
6. It must return that the indictment was made per sacramentum. * * *
7. It must name the jurors that presented the offense. * * *
8. They must be returned to be probi et legales homines, and de comitatu prædicto. * * *
9. It seems requisite also to add this clause, onerati et jurati ad inquirendum pro domino rege et pro corpore comit' prædict'. * * *

And thus far for the caption of the indictment, where, note: (1) That if the caption be faulty in the form, yet the same term it may be amended by the clerk of the assizes, or the peace, but not in another term.

2 Hale, P. C. c. XXIII.

PEOPLE v. BENNETT.

(Court of Appeals of New York, 1867. 37 N. Y. 117, 93 Am. Dec. 551.)

FULLERTON, J.[1] After the plea of not guilty had been entered, and the trial moved by the district attorney, the counsel for the prisoner made a motion to quash the indictment, because:

1. It did not appear, on the face of the indictment, that it was found or presented by a grand jury.

2. Because it did not appear, on its face, that it was found and presented by the requisite number of grand jurors.

3. Because it was not alleged, in the indictment, that the grand jury were charged and sworn by the Court of Sessions to inquire for the people of the state of New York, and for the body of the county of Cortland. * * *

That part of the indictment which is complained of as defective is as follows:

"Court of Sessions, "Cortland County. } Cortland County—ss:

"The jurors of the people of the state of New York, in and for the body of the county of Cortland, upon their oaths present."

Then follow apt words charging the defendant with the commission of a larceny. Here are all the requisites of a good commencement to an indictment. It plainly appears to have been found in the Court of Sessions for the county of Cortland, and by the jurors of

[1] Part of this case is omitted.

"In practice, in England, appending the caption is usually a ministerial act, and it is introduced as a part of the record, or return from an inferior to a superior court, from which a certiorari issues. Here the caption is usually drawn with the other parts of the indictment, and is embodied in the instrument returned by the grand jury as a true bill. But we do not think that an insuperable objection to showing, by a certificate, filed in the course of proceedings in a particular case, under the hand of the clerk, the actual time of filing the bill. It might be a good reason why an amendment should not be made of the caption in such cases. * * * The time of finding of the bill may be shown aliunde, when it becomes necessary to show that the bill was found at a day subsequent to the commencement of the session of the court." Dewey, J., in Commonwealth v. Stone, 3 Gray (Mass.) 453 (1855).

"Inasmuch as a prosecution, in this state, is never removed from one to a higher tribunal, a caption can be of no benefit to an indictment, and is uniformly dispensed with." Voorhies, J., in State v. Marion, 15 La. Ann. 495 (1860).

A caption is only necessary where the court acts under a special commission, and a mistake in the caption when the court sits by authority of public law will not vitiate the indictment. State v. Wasden, 4 N. C. 596 (1817).

"Following the cases cited above, we feel it our duty to regard the question as settled in this state, that a caption, such as is described in Reeves v. State [20 Ala. 33], supra, is an essential of a good indictment, and when the question comes before us on appeal, if the record does not contain such caption, it is fatal error. If it were an open question in this state, it might admit of serious doubt if this doctrine did not have its origin in certiorari proceedings from courts of limited, inferior jurisdiction, and that it should not be applied to records from courts of general jurisdiction." Stone, J., in Goodloe v. State, 60 Ala. 93 (1877).

the people for said county. It is true that it does not allege that it was found by a grand jury, or by the legal number of grand jurors; but these are plainly implied, because that body, legally constituted, alone have the power to present any one for trial. This has been frequently decided. McClure v. State, 1 Yerg. (Tenn.) 206, per Catron, J.

The form of this indictment is identical, mutatis mutandis, with that long since adopted in England, and which has obtained in most of the states in our own country. The form used in England nearly three hundred years ago was "juratores pro domina regina presentant quod," etc. West's Symboleography, pt. 2, p. 96. And it has been continued without exception to the present day. A great deal of confusion, however, exists in the books, because the distinction between the commencement and the caption of an indictment, which has always existed in England, has not uniformly been maintained here. "The whole question as to what a caption should contain," says Bishop, in his treatise on Criminal Procedure (section 154), "appears, when approached through the American books, draped in mist and girded about with darkness."

Observing the proper distinction between the caption and the commencement of an indictment, no valid objection will be found to the one in this case. The caption is no part of the indictment. It consists wholly of the history of the proceedings when an indictment is removed from an inferior to a superior court. As I have already stated, the form of an indictment in many of our own states, and which form is derived from England, is thus: "The jurors of the people of the state of ———, in and for the body of the county of ———, upon their oath present," etc. This is the commencement, and all that it need contain. * * *

So far, therefore, as the objections in this case go to the form of the indictment, the latter must be considered good. Should an indictment be found in an improper manner, or by an insufficient number of jurors, the way is open for redress by motion, which secures to the accused party immunity from an illegal trial or punishment. State v. Batchelor, 15 Mo. 207, 208; Reg. v. Hearne, 9 Cox, C. C. 433, 436; 10 Jurist (N. S.) 724; 4 Blackstone, 238; Bishop's C. P. § 448. * * *

II. The Statement of the Offense

The parts of an indictment are many. 2. The strictness required in indictments is great, because life is in question. 3. Therefore very nice and slender exceptions have been of latter ages allowed, and they have been with too much facility quashed and reversed. * * *

An indictment is nothing else but a plain, brief, and certain narrative of an offense committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature. * * *

1. Regularly every indictment ought to be in Latin, as all pleadings in the courts ought to be, and it is of excellent use, because, it being a fixed, regular language, it is not capable of so many changes and alterations as happen in vulgar languages. * * *[2]

Regularly false Latin doth not vitiate an indictment, if yet the indictment be reasonably intelligible, * * * as "præfato Reginæ," where it should be "præfatæ." But if the words be words of art, and by omission or misplacing of letters become insignificant, they vitiate the indictment, as "burgariter" for "burglariter," "feloniter" for "felonice," "murdredavit" for "murdravit"; but "burgulariter" hath been held good. 4 Co. Rep. 39 b, Brooks' Case. * * *

So if it make the indictment insensible or uncertain, as if A. and B. be indicted for stealing, "felonice cepit et asportavit," where it should be "ceperunt," it shall be quashed. P. 42 Eliz. B. R. Lane's Case, Cro. Eliz. 754; so in an indictment of murder, the stroke "in sinistro bracio," where it ought to be "brachio," for it appears not where the wound was, the words being insensible. T. 31 Eliz. B. R. Webster's Case, Cro. Eliz. 137.

Abbreviations that are usual are allowable in indictments. * * *[3] Figures to express numbers are not allowable in indictments. * * *[4]

2. An indictment grounded upon an offense made by act of Parliament must by express words bring the offense within the substantial description made in the act of Parliament, and those circumstances mentioned in the statute to make up the offense shall not be supplied by the general conclusion "contra formam statuti." * * * If a man be indicted for an offense, which was at common law, and concludes "contra formam statuti," but in truth it is not brought by the indictment within the statute, it shall be quashed, and the party shall not be put to answer it as an offense at common law.

2 Hale, P. C. c. XXIV.

An indictment consists of three parts: The commencement, the statement, and the conclusion. * * * The commencement of every indictment is thus: "Middlesex, to wit: The jurors for our lady the queen upon their oath present that." * * * The venue in the margin

[2] This was changed by St. 4 Geo. II, c. 26, and 6 Geo. II, c. 6, which requires all indictments to be in the English language. The use of Latin, it is believed, never obtained in the United States. Bishop, New Cr. Proc. 3342. See People v. Ah Sum, 92 Cal. 648, 28 Pac. 680 (1892).

[3] St. 4 Geo. II, c. 26, and 6 Geo. II, c. 6, prohibit abbreviations in indictments. See and cf. United States v. Reichert (C. C.) 32 Fed. 142 (1887); Commonwealth v. Desmarteau, 16 Gray (Mass.) 1 (1860); State v. Jericho, 40 Vt. 121, 94 Am. Dec. 387 (1868); State v. Kean, 10 N. H. 347, 34 Am. Dec. 162 (1839). Where the presence of abbreviations renders the indictment defective, objection must be taken before verdict. Commonwealth v. Desmarteau, 16 Gray (Mass.) 1 (1860).

[4] It is said to be the better practice to write figures at length than to express them in Arabic characters; but the employment of the latter will not vitiate the indictment. State v. Raiford, 7 Port. (Ala.) 101 (1838). Where it is held that words must be used instead of figures, the objection to the use of figures cannot be taken after verdict. Commonwealth v. Jackson, 1 Grant Cas. (Pa.) 262 (1855).

should be the county in which the offense was committed; or, if the jurisdiction of the court in which the bill of indictment is to be preferred extend only to part of the county, or * * * include more than one county, or be confined within the limits of a borough, * * * the venue in the margin should be coextensive with the jurisdiction of the court. This is the general rule of the common law; but many exceptions have been made to it by statute.

Archbold's Crim. Plead. (13th Ed.) 20.

The most considerable parts of an indictment in capital offenses are: 1. The name and addition of the party offending. 2. The day and time of the offense committed. 3. The place where it was committed. 4. Upon or against whom committed. 5. The manner of the commission of it. 6. The fact itself and the nature of it. 7. The conclusion.

Regularly every indictment ought to conclude "contra pacem domini regis." [5]

If an offense be newly enacted, or made an offense of an higher nature by act of Parliament, the indictment must conclude "contra formam statuti."

2 Hale, P. C. c. XXV.

If an indictment do not conclude "contra formam statuti," and the offense indicted be only prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it.[6] But if the offense were also an offense at common law, I take it to be in a great measure settled at this day that judgment may be given as for an offense at common law, though the indictment conclude "contra formam statuti."

If there be more than one statute concerning the same offense, and the first of them was never discontinued, and the latter only continue the former without making any addition to it, or only qualify the method of proceeding upon it, without altering the substance of its purview, it seems agreed that it is safe, in an indictment upon any such statute, to conclude "contra formam statuti"; and it hath been holden that a conclusion "contra formam statutorum" will in such cases vitiate the prosecution. * * * But where a statute hath been wholly discontinued, and is afterwards revived, there seem to have been some opinions that a prosecution on it ought to conclude "contra formam statutorum."

Also where the same offense is prohibited by several independent statutes, there are some authorities that you must either conclude "contra formam statutorum," or "contra formam" of the particular statutes, naming them, and that if you barely conclude "contra formam statuti," the indictment will be insufficient, for not showing on which

[5] See Anderson v. State, 5 Ark. 444 (1843); Reg. v. Lane, 6 Mod. 128 (1704).

[6] State v. Soule, 20 Me. 19 (1841); People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197 (1834). Statutes in England and in some states have abolished the necessity for the conclusion. Castro v. Reg. 14 Cox, C. C. 546 (1881); State v. Dorr, 82 Me. 341, 19 Atl. 861 (1890).

one of the statutes it was taken. But there are also strong authorities for the contrary opinion, which is also most agreeable to precedents.[7]

2 Hawkins, P. C. c. 25, §§ 116, 117.

EVANS v. STATE.

(Court of Criminal Appeals of Texas, 1895. 34 Tex. Cr. R. 110, 29 S. W. 266.)

HENDERSON, J.[8] * * * There was a motion by defendant to quash the indictment on the ground that the indictment contained the word "possion," and not "possession," which was overruled by the court, and a bill of exception saved by the defendant. The defendant also objected to the evidence regarding the taking of the clothing, on the ground that there was no proper allegation in the indictment charging that same were in the possession of Barnard. The court overruled the objection, and to this defendant reserved an exception. The defendant also reserved a bill of exception to the charge of the court on possession, on the ground that there was no sufficient allegation in the indictment to support such charge.

The sufficiency of the word "possion," as used in the indictment, instead of the word "possession," used in the statute defining robbery, is thus presented for our consideration. We have examined the dictionaries, and nowhere find such a word as "possion," nor do we find it used as an abbreviation for "possession" or any other word. It is not idem sonans with the word "possession," nor can we consider it simply as an instance of bad spelling. Evidently the pleader intended to write in the indictment the word "possession," but with us it is not a question of what he means, but what did he do; and the word "possession," in defining the offense of robbery, is material, and we cannot supply it by intendment.

In Jones v. State, 25 Tex. App. 621, 8 S. W. 801, 8 Am. St. Rep. 449, this court at a former term held that in an indictment for theft the word "appriate" was not equivalent to the word "appropriate" as used in the statute defining theft, and that its use vitiated the indictment. In State v. Williamson, 43 Tex. 502, referred to in the above cases, the very word "possion" used in the indictment in this case was used in the indictment in that case. The question came up in that case on a motion in arrest of judgment. The court in that case seemed to treat the word as one of form, saying, "An objection of this character should be interposed before the trial, and should not be made the ground of a motion in arrest of judgment;" and yet they say, "It cannot be doubted that the indictment must aver that the property was taken from the possession of the owner."

[7] See U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204 (1834).

[8] Part of this case is omitted.

We do not think it can be doubted that if an indictment for theft or for robbery should fail to properly allege the possession of the property taken it is a matter of substance, and of such materiality that it can be taken advantage of by motion in arrest of judgment, as well as by a motion to quash the indictment; and the only question for us to determine is, does the use of the word "possion" accomplish this? As before stated, the word used is not idem sonans with "possession," and it is not an abbreviation of that word, and we cannot supply a proper word conveying in its meaning a material averment in an indictment. If we were to undertake to do so, we would afford a bad precedent, when, by the rigid adherence to the rule, those who draw indictments will be encouraged to use more care and diligence, and mistakes will thus be avoided. * * *

The judgment of the lower court is accordingly reversed and remanded.[9]

STATE v. COLLY.

(St. Louis Court of Appeals, Missouri, 1897. 69 Mo. App. 444.)

BLAND, P. J.[10] At the February term, 1893, of the Lawrence county circuit court, the defendant was indicted for a violation of the dramshop law. The charge was, that he sold one bottle of "larger" beer. The case was taken to the Barry county circuit court by change of venue, and at the November, 1895, term thereof he filed his motion to quash the indictment, because the indictment charges the selling of "larger" beer (not "lager" beer). This motion was overruled. A trial was had by the court sitting as a jury. Defendant was convicted. Motions in arrest and for new trial were filed and overruled, bill of exceptions filed, and appeal taken to this court.

The fact that the pleader used one "r" too many in his spelling of the word "lager," in the absence of the fact that the use of this superfluous letter did not construct another word having a separate and different signification from the word "lager," makes it quite clear that it is a case of misspelling, which does not vitiate a pleading, civil or criminal, where, as in this case, it is apparent what word was intended to be used, and where the word as spelled has the same sound as the intended word, when correctly spelled. The evidence supported the finding of the court. No instructions were asked or given.

We find no error in the record, and affirm the judgment. All concur.[11]

[9] Accord: "Maice" for "malice." Wood v. State, 50 Ala. 144 (1873). "Larcey" for "larceny." People v. St. Clair, 56 Cal. 406 (1880). "Farther" for "father." State v. Caspary, 11 Rich. Law (S. C.) 356 (1858).

[10] Part of this case is omitted.

[11] Accord: "Eiget" for "eight." Somerville v. State, 6 Tex. App. 433 (1879). "Mair" for "mare." State v. Myers, 85 Tenn. 203, 5 S. W. 377 (1886).

STATE v. EDWARDS.

(Supreme Court of Missouri, 1854. 19 Mo. 674.)

RYLAND,[12] Judge, delivered the opinion of the court. * * * The omission in this indictment consists of the neglect to insert the word "did" before the words "assault, beat and maltreat one Stephen L. Page, in the peace then and there being, and other wrongs," etc., so as to make the sentence read thus: "With force and violence, in a turbulent and violent manner, 'did' assault, beat and maltreat," etc. We are inclined to think that this word "did" may, in this indictment, be supplied by intendment.

In indictments for misdemeanors merely, such intendment is often resorted to. The strictness and rigor in the construction of indictments for felonies are not applied uniformly to indictments for mere misdemeanors. In the case of State v. Halder, 2 McCord (S. C.) 377, 13 Am. Dec. 738, the omission to insert the word "did" before the words "feloniously utter and publish, dispose and pass" was held fatal, and the judgment was arrested. This indictment was for a felony.

In the case of State v. Whitney, 15 Vt. 298, which was an indictment for a misdemeanor, selling liquor by the small measure, without license, the word "did" was omitted, which should have been joined with the words "sell and dispose of." This omission was held not to be fatal on motion in arrest of judgment. Bennett, J., in delivering the opinion of the court, said: "In this indictment, it is alleged that the respondent, on the first day of August, A. D. 1842, at, etc., sell and dispose of, etc. It is evident the omission is purely a clerical one. The auxiliary verb may be supplied by intendment."

There was no necessity to supply this auxiliary verb "did" before one of the verbs used in this sentence above quoted, viz., the verb "beat." Leaving out the words "assault and maltreat," and using the verb "beat" alone, and the charge is positive and direct. The words in the beginning of this sentence, "with intent," may be rejected as surplusage. They do not injure the indictment, being no part of the description of the offense, and may be stricken out, leaving the offense full and complete. But it is very clear that the words "assault, beat and maltreat" express all the action which is imputed to the defendant, and no one can misapprehend their sense in the connection in which they are used, and the helping verb will at once be supplied by intendment. In the case of King v. Stevens & Agnew, 5 East, 260,

"Assatt" for "assault." State v. Crane, 4 Wis. 400 (1854). "Janury" for "January." Hutto v. State, 7 Tex. App. 44 (1879). "Rill" for "kill." Irvin v. State, 7 Tex. App. 109 (1879). "Frausulently" for "fraudulently." St. Louis v. State (Tex. Cr. App.) 59 S. W. 889 (1900). "Gol" for "gold." Grant v. State, 55 Ala. 201 (1876).

[12] Part of this case is omitted.

Lord Ellenborough said: "If the sense be clear, nice exceptions ought not to be regarded." In respect of this, Lord Hale says (2 Hale, P. C. 193): "More offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence, and many heinous and crying offenses escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and the dishonor of God."

Upon the whole, it is the opinion of this court that the judgment below be affirmed; and, the other judges concurring, it is affirmed accordingly.[13]

STATE v. GILBERT.

(Supreme Court of Vermont, 1841. 13 Vt. 647.)

REDFIELD, J.[14] The objection to the use of the words Anno Domini, in the caption of the indictment, cannot prevail. The abbreviations A. D., standing for these same words, were considered sufficient in an indictment. State v. Hodgeden, 3 Vt. 481. A fortiori, the words themselves should be. These words have become literally English by adoption. The same is true of a very considerable number of terms in the language. Most of these adopted terms have changed their costume, while others have not. "Phenomenon" and "memorandum" are as strictly English as any terms of the most purely Saxon derivation. Others are not the less so because they still retain their foreign dress; e. g., pro tempore, sine die, nemine contradicente, bona fide, Anno Domini, as well as ennui, sang froid, beaux, cap-a-pie, tête-a-tête, and thousands of others, which are well understood by mere English readers. * * *[15]

REX v. WHITEHEAD.

(Court of King's Bench, 1693. 1 Salk. 371.)

Mr. Northey moved to quash two indictments, which were quod cum an order was made that the parishioners should receive a bastard child; they in contempt did refuse to receive it. And because it was not positively said, that it was ordered that they should receive it, but only by recital with a quod cum, they were quashed.[16]

[13] See, also, State v. Raymond, 20 Iowa, 582 (1866); State v. Whitney, 15 Vt. 298 (1843); Ward v. State, 8 Blackf. (Ind.) 101 (1846). Compare McCearley v. State, 97 Miss. 556, 52 South. 796 (1910), and State v. Hawkins, 153 N. C. 466, 71 S. E. 326 (1911).

[14] Part of this case is omitted.

[15] See, also, State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305 (1844). Cf. State v. Mitchell, 25 Mo. 420 (1857).

[16] Cf. Rex v. Ryland, L. R. 1 C. C. 99 (1867); Rex v. Lawley, 2 Str. 904 (1730).

BURROUGH'S CASE.

(Court of King's Bench, 1676. 1 Vent. 305.)

He and others were indicted, for that they being churchwardens, overseers of the poor, and he a constable, did contemptuously and voluntarily neglect to execute diversa præcepta et warranta, directed to them by the bailiffs of Ipswich (being justices of the peace) under their hands and seals, etc. It was moved to quash it, for that the nature and tenor of the warrants were not expressed in the indictment; for unless the parties know particularly what they are charged with, they cannot tell how to make their defense.

And for that reason it was quashed by the court.

REX v. ROBE.

(Court of King's Bench, 1735. 2 Strange, 999.)

An information was filed against him for several illegal exactions in his office of clerk of the market, and there were several counts specifying sums taken of particular persons, upon all which distinct charges the defendant was acquitted; but at the close of the information there was a general charge, of which he was found guilty, viz., that under color of his said office he did illegally cause his agents to demand and receive of several other persons several other sums of money, on pretense of weighing and examining their several weights and measures. Exception was taken, that this is so general a charge, that it is impossible any man can prepare to defend himself on this prosecution, or have the benefit of pleading it in bar to any other; and for this fault the judgment was arrested.

III. The Conclusion

REX v. CLERK.

(Court of King's Bench, 1695. 1 Salk. 370.)

Indictment that twenty persons being assembled, the defendant, not being licensed, preached to them, not concluding contra formam statuti, was quashed, for they might be the defendant's own family, to which the statute does not extend, and it is not an offense at common law. But Dolben differed in this.

ANONYMOUS.

(Court of King's Bench, 1649. Style, 186.)

The court was moved to quash an indictment against a baker for selling of bread under the assize. The exceptions were: 1. That it doth not say what assize, whereas there be divers assizes of bread. * * *

ROLL, Chief Justice, said to the first exception, it is good enough to say he sold the bread contra assisam, although it say not what assize.[17]

ANONYMOUS.

(Upper Bench, 1655. Style, 449.)

The court was moved to quash an indictment against one Peers, for speaking provoking language to one, contrary to the late ordinance of the Lord Protector and his council, upon these exceptions: * * * 2dly. It is said by an ordinance of the Protector, made such a day, and doth not say in that case provided. And upon these exceptions it was quashed.[17]

ANONYMOUS.

(Court of King's Bench, 1662. 1 Vent. 108.)

An indictment for not performing an order of the justices of the peace concerning a bastard child. It was moved to quash it because it did not conclude contra pacem. But it was held that ought not to be it being but for a non feasans.[18]

[17] Part of this case is omitted.

[18] In lieu of these technical words the following forms have been held sufficient: "Contrary to law." Hudson v. State, 1 Blackf. (Ind.) 317 (1824). [But see Commonwealth v. Stockbridge, 11 Mass. 279 (1814).] "Contrary to the true intent and meaning of the act of Congress of the United States, in such case made and provided." U. S. v. Smith, 2 Mason, 143, Fed. Cas. No. 16,338 (1820). Contra: "In contempt of the laws of the United States of America." U. S. v. Andrews, 2 Paine, 451, Fed. Cas. No. 14,455 (1832).

IV. Duplicity, Repugnancy, and Surplusage

SMITH et al. v. STATE.

(Supreme Court of Nebraska, 1891. 32 Neb. 105, 48 N. W. 823.)

Norval, J.[19] On the 6th day of May, 1889, the county attorney filed in the district court of Lancaster county an information charging "that Moses Smith and W. Kief, late of the county aforesaid, on the 1st day of February, A. D. 1889, in the county of Lancaster and state of Nebraska, aforesaid, did unlawfully sell, give away, and vend spirituous, vinous, and intoxicating liquors to Orin Snyder, Frank Martin and P. H. Cooper, and to other persons to the county attorney unknown, without having first complied with the provisions of the Compiled Statutes of the state of Nebraska, and without first having taken out a license to sell, give away, and vend spirituous, vinous, and intoxicating liquors; the said above sales of spirituous, vinous, and intoxicating liquors by said Moses Smith and W. Kief, as aforesaid, being without authority, and contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of Nebraska." The defendants moved the court to quash the information. * * *

The motion to quash the information should have been sustained. The information is too indefinite and uncertain. It contains but one count, and charges that the defendants sold and gave away spirituous, vinous, and intoxicating liquors. It was held in State v. Pischel, 16 Neb. 490, 20 N. W. 848, that the act of selling any of the liquors named in section 11 of chapter 50 of the Compiled Statutes, as well as the act of giving away any of them, without a license so to do, is a crime. We adhere to the rule therein announced. This case is not distinguishable from State v. Pischel. As the judgment must be reversed for the error pointed out, it will not be necessary to notice the other assignments of error.

The judgment is reversed, and the cause remanded for further proceedings. The other judges concur.[20]

[19] Part of this case is omitted.

[20] See, for use of the disjunctive in the statement of an offense, People v. Hood, 6 Cal. 236 (1856); Sims v. State, 135 Ala. 61, 33 South. 162 (1902).

If the disjunctive can be construed to mean "to wit" (see State v. Gilbert, 13 Vt. 647 [1841]), or if the disjunctive and what follows can be rejected as surplusage (State v. Corrigan, 24 Conn. 286 [1855]), the disjunctive allegation will not render the indictment bad.

COMMONWEALTH v. TWITCHELL.

(Supreme Judicial Court of Massachusetts, Hampshire, Franklin and Hampden, 1849. 4 Cush. 74.)

METCALF, J.[21] 1. It is unnecessary to inquire, in this case, whether duplicity in an indictment is a cause for arresting judgment; because we are of opinion that the allegation, in this indictment, that the defendant "did set up and promote" an exhibition, does not make the indictment objectionable for duplicity, but charges only one offense. In Commonwealth v. Eaton, 15 Pick. 273, an indictment, which alleged that the defendant "did unlawfully offer for sale, and did unlawfully sell," a lottery ticket, was held good, on demurrer; and we cannot distinguish that case from this. So an indictment, which avers that the defendant "did write and publish, and cause to be written and published," a malicious libel, is not bad for duplicity. 2 Gabbett, Crim. Law, 234; 3 Chit. Crim. Law (4th Am. Ed.) 877, et seq. * * *

Exceptions overruled.[22]

SPROUSE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia, 1886. 81 Va. 374.)

LACY, J., delivered the opinion of the court.[23] * * *

The first assignment of error here is to the ruling of the county court in refusing to quash the indictment. That the said indictment is double and presents a case of duplicity in pleading; that the forgery of the check was one offense, and the forgery of the indorsement was another offense, and that two distinct offenses were contained in the same count; that the forgery of the check alone was an indictable offense—citing Perkins' Case, 7 Grat. 651, 56 Am. Dec. 123; that the forgery of the indorsement was an indictable offense—citing Powell's Case, 11 Grat. 822; and that the said second count is liable to the same objection, and is equally defective.

Duplicity, or double pleading, consists in alleging, for one single

[21] Part of this case is omitted.

[22] See, also, Wein v. State, 14 Mo. 125 (1851); Wessels v. Kansas, McCahon (Kan.) 100 (1860); Cobb v. State, 45 Ga. 11 (1872).

"When one count in an indictment charges two offenses, distinct in kind and requiring distinct punishments, the objection of duplicity has been allowed in arrest of judgment. Commonwealth v. Symonds, 2 Mass. 163; State v. Nelson, 8 N. H. 163; People v. Wright, 9 Wend. (N. Y.) 193. But when the two offenses are precisely alike, the only reason against joining them in one count is that it subjects the accused to confusion and embarrassment in his defense. The objection is not open after a verdict of guilty of one offense only, but must be taken by motion to quash, or to compel the prosecutor to confine himself to one of the charges." Gray, C. J., in Commonwealth v. Holmes, 119 Mass. 195 (1875).

[23] Part of this case is omitted

purpose or object, two or more distinct grounds of complaint, when one of them would be as effectual in law as both, or all. This is a fault in all pleading, because it produces useless prolixity, and tends to confusion, and to the multiplication of issues. This, however, is only a fault in form. The criminal law does not permit the joinder of two or more offenses in one count.

We must consider what are two or more distinct offenses within the rule just stated. It is not an objection to an indictment that a part of the allegations might be lopped off and the indictment remain sufficient; and, although the charge might be branched out into two offenses, if the whole be but parts of one fact of endeavor, all the parts may be stated together. Of this there are familiar illustrations. An accused might be charged with selling the different kinds of liquor contrary to law. The sale of each kind would be an indictable offense, yet an indictment setting forth a violation of the law in selling all could not be said to charge several distinct offenses. A man may be indicted for the battery of two or more persons in the same count, yet the battery of each was an offense; yet they may be charged together, because they are but parts of one endeavor—the offense against the commonwealth being the breach of the peace. Or a libel upon two or more persons, when the publication is one single act, may be charged in one count without rendering it bad for duplicity under the rule stated above. Or in robbery, with having assaulted two persons, and stolen from one one sum of money, and from the other a different sum, if it was all one transaction. Or where two make an assault, with an intent to kill, with different weapons, they may be charged jointly in one count. And if a man shoots at two persons to kill either, regardless of which, he may be convicted on a charge of a joint assault, yet either assault was an offense.

And, as was asked by an English judge: "Cannot the king call a man to account for a breach of the peace because he broke two heads instead of one? How many informations have been for libels upon the king and his ministers?" Rex v. Benfield, 2 Burrows, 980.

In Barnes v. State, 20 Conn. 232, Waite, J., said upon this question: "No matters, however multifarious, will operate to make a declaration or information double, provided that all taken together constitute but one connected charge or one transaction." And Mr. Bishop says this observation may be accepted as expressing the common doctrine, when we add to it the words: "Provided, also, that in any view which the law could take of the one transaction, it may be regarded as constituting but one offense"—citing the case of Francisco v. State, 24 N. J. Law, 30–32, where it was held that a conviction on an indictment charging assault, battery and false imprisonment was not bad for duplicity, because, as was said by Potts, Judge: "The assault, the battery, the false imprisonment, though in themselves, separately considered, they are distinct offenses, yet, collectively, they constitute but one offense."

Multiplication of authority, or of argument, cannot be necessary on this point, and we will conclude this question with a remark of Baron Parke, who said to counsel: "Your objection would apply to every case of a burglary and a larceny. There would be, first, the burglary; secondly, the larceny; thirdly, the compound or simple larceny; fourthly, the stealing in a dwelling house." When Tindal, Chief Justice, added: "This is one set of faults. It is all one transaction. The prisoner could not have been embarrassed." Rex v. Bowen, 1 Denison's Crown Cases, 22; Archbold Crim. Pl. (13th London Ed.) p. 54.

In this case the prisoner was charged with forging a check payable to Gibson, and then forging Gibson's name on the back. This appears to be one transaction, a forgery, looking to the prejudice of another's right, a single fact of one endeavor; and, as was said by Tindal, C. J., supra: "This is one set of facts. It is all one transaction. The prisoner could not have been embarrassed." We think there was no defect in the indictment, and the motion to quash was properly overruled. * * *

Judgment affirmed.[24]

HUME v. OGLE.

(Court of Queen's Bench, 1590. Cro. Eliz. 196.)

Appeal of the death of her husband. And declares, that the defendant, such a day, at West Lilburne in the said county, gave him a mortal wound, of which, at Wetwood in the said county, he languished, and the same day there died; and so the said defendant, the same day and year, at West Lilburne aforesaid, her said husband modo et forma prædict' murdravit. And although not guilty pleaded, and issue joined upon it, yet he waived it, and demurred upon the declaration (as it was clearly held by THE COURT he might). For if the declaration be not good, it is in vain to proceed to a trial; yet it was clearly held, that it is not peremptory to the defendant; for if it be adjudged against him, it is but a respondeat ouster. And the cause of the demurrer was, that the death is supposed to be at Wetwood, and yet the murder is supposed to be at West Lilburne, which is contrary, and cannot be; for although the stroke is supposed to be at West Lilburne, yet it is not felony till his death, which was at Wetwood, and there the murder is supposed to be done; and the Case of Heyden, 4 Co. 41, was cited. And as the indictment there was insufficient for the time, so here for the place, which is more material; for from this the venire shall come; but if it had been, et sic murdravit modo et forma prædicta, it had been good. And Ive said, divers of the ancient precedents are, that the murder is supposed to be where the stroke was.—But THE JUSTICES held clearly, that the indictment was ill; for of necessity it must be at the place of his death. And although the precedents are

[24] Compare Reed v. State, 88 Ala. 36, 6 South. 840 (1889).

so, yet they did pass sub silentio, and were not well examined, and not to be regarded, as Heyden's Case; and it was resolved, that there was no difference between the cases; and adjudged, that the appeal did abate.

STATE v. SALES.

(Supreme Court of Louisiana, 1878. 30 La. Ann. 916.)

EGAN, J.[25] George Sales was indicted for the murder of one Taylor. In the same indictment it was also charged "that one Dan Proffit, one William Sales, and one Edward Ryan, with force and arms, did feloniously, willfully, and of their malice aforethought [did] assist and abet the said George Sales in the killing and murdering the said William Taylor aforesaid," etc. "Therefore [the grand jury] do find and present the said Dan Proffitt, William Sales, and Edward Ryan, as aforesaid, being accessory before the fact of the killing and murdering the aforesaid William Taylor." * * *

As to the second ground of the motion in arrest, we think the objection to the indictment fatal. The accused Proffitt was evidently intended to be indicted as accessory before the fact, but the statement in the indictment that he did with force and arms willfully and feloniously and with malice aforethought "assist and abet" the killing and murdering is wholly inconsistent with the charge of being accessory either before or after the fact, and one so charged cannot be indicted as accessory. State v. White, 7 La. Ann. 531; Chitty's Crim. Law, 262, 269; State v. Maxent, 10 La. Ann. 743. An accessory before the fact is one who, being absent at the time of the commission of the crime (and of course being unable to "assist and abet" in its commission), doth yet procure, counsel, or command its commission. 1 Hale's Pleas of the Crown, p. 616.

The indictment is therefore bad for this reason, and as it attempts to charge the accused as accessory before the fact in terms it is also bad as an indictment against Proffitt as a principal offender, as he could not be both absent and present at the same time, and without being present could not be a principal in the murder. Besides, the indictment contains but one count, and even if both crimes were consistent and otherwise properly charged, it would be bad for that reason also.

The motion in arrest of judgment must prevail. * * *[26]

[25] Part of this case is omitted.

[26] See, also, Jones v. State, 63 Ala. 27 (1879).

STATE v. DANDY.

(Constitutional Court of South Carolina, 1804. 1 Brev. 395.)

This was an indictment for a misdemeanor, charged to have been committed by the defendant in compounding a felony, and was tried before Trezevant, J. The felony stated in the indictment was for passing a counterfeit bank bill, which was charged to have been committed on the 5th day of November, 1802. The indictment then stated that "afterwards, to wit, on the 1st day of June, 1800," the said felony was compounded. The prisoner was found guilty; and now a motion was brought forward in this court in arrest of judgment.

PER CURIAM. The indictment is absurd. It is impossible that the defendant could be guilty of the offense as charged.

Judgment arrested.[27]

REX v. MORRIS.

(Court of King's Bench, 1774. 1 Leach, 109.)

Robert Edwards was tried before Mr. Justice Ashhurst, at the Old Bailey, in September session, 1774, for robbing Thomas Morgan on the highway of a gold watch, chain, and seals; and the same indictment charged "that Francis Morris the goods and chattels above mentioned, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have; he the said Thomas Morris, then and there, well knowing the said goods and chattels last mentioned to have been feloniously stolen, taken, and carried away."

The prisoners were found guilty; but it was moved in arrest of judgment that, the indictment having alleged that Francis Morris had received the property, and that Thomas Morris knew it to have been stolen, the conviction could not be supported as against the accessory, for that the fact of receiving and the knowledge of the previous felony must reside in the same person; whereas the indictment charged them in two different persons, one of the name of Francis, and the other of the name of Thomas.

The point was reserved for the opinion of THE TWELVE JUDGES, upon the following question: Whether the words "the said Thomas Morris," could be rejected as surplusage? and they were unanimous that, as the indictment would be sensible and good without these words, they might be struck out as superabundant and unnecessary.

[27] Where the repugnant averments are not material, and the indictment is otherwise good without them, they may be rejected as surplusage. See 1 Chit. Cr. Law, 173.

"No indictment * * * shall be deemed invalid * * * for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged. * * *" Rev. St. Mo. § 1821. See State v. Chamberlain, 89 Mo. 129, 1 S. W. 145 (1886).

FULFORD v. STATE.

(Supreme Court of Georgia, 1874. 50 Ga. 591.)

TRIPPE, J.[28] The indictment in this case not only charged the defendant, as principal in the second degree, in being present, aiding and abetting the chief perpetrator of the alleged offense, but proceeded further and specified the acts whereby the aiding and abetting were done. The prosecuting counsel, on motion, struck these descriptive averments from the indictment, over the objection of defendant.

We recognize the rule that it is not necessary to prove allegations in an indictment which are immaterial or purely surplusage. But the question is, what are immaterial averments? Or, rather, when do averments which might have been omitted become material—or, at least, so enter into the indictment as framed that they cannot be stricken or rejected as surplusage? Starkie on Evidence, vol. 3, p. 1539, says it is a most general rule that no allegation, which is descriptive of the identity of that which is legally essential to the claim or charge, can ever be rejected; and on page 1542, same volume, makes it more specific by restating the rule thus: "The position that descriptive averments cannot be rejected extends to all allegations which operate by way of description or limitation of that which is material." Bishop says: "If the indictment sets out the offense as done in a particular way, the proof must show it so, or there will be a variance. And where there is a necessary allegation which cannot be rejected,

[28] The statement of facts is omitted.

"The indictment is sufficient under the criminal procedure act, and the motion to quash was rightfully refused. It does not furnish sufficient information to enable the defendant to prepare his defense, and this may often occur where the law declares an indictment good, 'which charges the crime substantially in the language of the act of assembly prohibiting the crime, and prescribing the punishment, if any such there be, or, if at common law, so plainly that the nature of the offense may be easily understood by the jury.' Prior to 1860, when greater particularity was required in setting out the offense in the indictment, it sometimes failed to give the defendant such notice as he was entitled to, of the specific matters which would be attempted to be proved against him on the trial. Whenever such is the case, the accused may apply to the court or judge for an order that a bill of particulars be filed, and on the trial the commonwealth will be restricted to the proof of the items contained therein. Rex v. Hodgson, 3 C. & P. 422; Rex v. Bootyman, 5 C. & P. 300; Commonwealth v. Snelling, 15 Pick. (Mass.) 321. Doubtless, had the defendant made application, a bill of particulars would have been ordered. In simplifying indictments, it was not the intendment to make their brief and comprehensive terms a cover for snares to be sprung on the accused. Whether a refusal to order the bill would be a subject of review is a question not now raised." Trunkey, J., in Williams v. Commonwealth, 91 Pa. 502 (1879).

"The application [for a bill of particulars] is one addressed to the discretion of the court, and its action thereon is not subject to review." Brown, J., in Dunlop v. United States, 165 U. S. 491, 17 Sup. Ct. 376, 41 L. Ed. 799 (1896).

"He who has furnished a bill of particulars * * * must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration." Merrick, J., in Commonwealth v. Giles, 1 Gray (Mass.) 469 (1851).

yet the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other." 1 Bishop's C. P. §§ 234, 235. If the prosecutor state the offense with unnecessary particularity, he will be bound by that statement, and must prove it as laid. United States v. Brown, 3 McLean, 233, Fed. Cas. No. 14,666; Rex v. Dawlin, 5 T. R. 311.

In the case in 3 McLean, the indictment charged the postmaster with stealing a letter containing certain bank notes. It was held that the averment as to the bank notes might have been omitted, and an offense was charged without those words; but, being in, they must be proved. So in United States v. Porter, 3 Day, 283, Fed. Cas. No. 16,074, the charge was stopping the mail, with an averment of a contract between the Postmaster General and the carrier. Though this averment was not necessary to the indictment, it was adjudged that it must be proved. In State v. Copp, 15 N. H. 212, the defendant was indicted for resisting the sheriff legally appointed and duly qualified. Although the appointment and qualification might have been omitted, it was held that it was necessary to establish them by testimony. Where the statute made it penal to sell spirituous "or" intoxicating liquors, and the charge was the selling of spirituous "and" intoxicating liquors, the prosecutor was bound to show the liquor to be both spirituous and intoxicating. Commonwealth v. Eagan, 4 Gray (Mass.) 18. See Commonwealth v. Varny, 10 Cush. (Mass.) 402; Commonwealth v. Butcher, 4 Grat. (Va.) 544; United States v. Keen, 1 McLean, 429, Fed. Cas. No. 15,510.

These decisions agree with the rule as quoted from Bishop and Starkie. The confusion that grows out of applying it may be avoided by observing the qualification of it, or rather the statement of another rule given by Bishop, Chitty, and Phillips. Chitty (1 Criminal Law, 294, 295), says: "If any unnecessary averments, disconnected with the circumstances which constitute the stated crime, be introduced, they need not be proved, but may be rejected as surplusage." See, also, 1 Chancery Pleadings, 263. Bishop and Phillips state this rule to be, if the entire averment may be omitted of which the descriptive matter is a part, or can be rejected as surplusage, then the descriptive matter falls with it and need not be proved. Phillips' Evidence (8th Ed.) 854; 1 Bishop, Criminal Proceedings, § 235. Or, as it is put in 3 McLean, supra, if the averment be mere facts disconnected with the offense, they need not be proved. See, also, on this distinction in the rule, State v. Copp, 15 N. H. 212.

These authorities show the line between material and immaterial averments, and where those which might have been omitted, when once introduced, become an important part of the indictment, and cannot be rejected as surplusage or stricken out, but must be proved. And there is reason and justice in the distinction. Take this case. It was not necessary that the pleader should have stated the acts of the

defendant which constituted his "aiding and abetting," or to define how it was done. The "aiding and abetting" was an essential averment. The defendant was charged with so doing "by pushing, striking, assaulting and threatening the said J. A. Conway." He was put on notice that it would be proved on him that he did these things. He proposes to meet the charge, and to show that he did not push, strike, assault or threaten the said Conway. The aiding and abetting may be made out by proving many other ways in which it may be done, totally foreign to those set forth in the indictment. The prosecution, knowing this, proposes to strike out all these descriptive averments and leave an open field for any and all proof of any and all forms or ways in which the aiding and abetting may be shown. This would be permitting a defendant to be called upon to meet a charge specifically made in one form and then to allow him to be convicted by a change of the indictment on proof of acts totally distinct from those of which he was notified. It is hard enough that a defendant may be convicted on a general averment of "aiding and abetting," without subjecting him, after specific acts are charged, to the hazard of having them stricken after he may have prepared to meet them as made, and to a conviction for acts of any kind that the prosecution may see fit to produce. We do not think it can be done on principle or authority.

Judgment reversed.

CHAPTER IX

THE INDICTMENT—CONTINUED

SECTION 1.—PARTICULAR AVERMENTS

I. Averment of Facts and Circumstances Neccessary to Constitute the Offense

REX v. STRIDE.

(High Court of Justice, King's Bench Division [1908] 1 K. B. 617.)

Lord Alverstone, C. J.[1] This case raises a question of very great interest and importance with respect to the averments which it is necessary that an indictment should contain. Two persons were indicted, one a keeper named Stride, for stealing, and the other a man named Millard, for receiving a quantity of pheasants' eggs, and the main point which has to be decided is whether the indictment sufficiently avers that the eggs were the subject of larceny. * * *

We now come to the main objection, which was taken to both counts of the indictment. It was contended that they are bad in that they do not allege that the pheasants' eggs in question had been reduced into the possession of Sir Walter Gilbey at the time of the stealing. It was not, indeed, disputed by counsel for the defendants that if a keeper is employed by his master to collect, either himself or by the underkeepers, the wild pheasants' eggs, and does collect them and have them in possession on behalf of his master, those eggs, if subsequently stolen, would be the subject of larceny; but it is said that the indictment ought to contain some expression to show that they had been collected from the wild pheasants' nests.

The question is whether the indictment as it stands is sufficient. The indictment charges that Stride "one thousand pheasants' eggs of the goods and chattels of and of and belonging to Sir Walter Gilbey feloniously did steal." Now I ask myself whether that averment does not, when read fairly, involve the necessity of those eggs having been already collected. In the first place, having regard to the large quantity of eggs alleged to have been stolen, no one reading the indictment could possibly think that the charge related to the taking of the eggs when in the nest; and, in the second place, in addition to the ordinary formal words "of the goods and chattels of," we find the words "and

[1] Part of this case is omitted

of and belonging to." It was said that the latter words were surplusage, as being merely another way of saying the same thing over again. But I do not take that view. I think that the words "and of and belonging to" may fairly mean that the eggs "had been collected by or on behalf of." Looking at the indictment as a whole, I should, apart from authority, be prepared to hold that it sufficiently charges that the eggs had been reduced into possession to satisfy the strictest rule of criminal pleading.

It has been argued that there are authorities to the contrary. The principal of these was Rough's Case, 2 East, P. C. 607, the correctness of the report of which I have been able to verify by reference to the original MS. of Buller, J., from which the report is taken. The prisoner there was convicted of stealing "a pheasant, value 40s., of the goods and chattels of H. S." There were no additional words in the indictment there. The judges were all agreed, "after much debate and difference of opinion," that the conviction was bad on the ground that "in cases of larceny of animals feræ naturæ the indictment must show that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add 'of the goods and chattels' of such an one." But that case does not appear to me to be an authority in favor of the present defendants. For there was no suggestion on the face of the indictment that the pheasant was other than a wild pheasant. It contained no statement that it was "of and belonging to H. S.," or any other words to suggest that it had in fact been reduced into possession.

It seems to me that when you get a state of facts on the face of the indictment, as in the present case, which is only consistent with the articles, which are alleged to have been stolen, having been reduced into possession, it would be extremely artificial to say that that natural inference must be rejected because the articles under certain other circumstances might not be the subject of larceny. I think that if we were to take any other view of the present indictment than that which we do our decision would more properly "belong to a time when," as Lord Russell of Killowen observed in Reg. v. Jameson, [1896] 2 Q. B. 425, "the right and justice and substance of the thing were sacrificed to the science of artificial statement." * * *

The objection to the indictment therefore fails, and the conviction must be affirmed.

I desire to add that I dissent from the proposition contended for by Mr. Rawlinson that the taking of birds' eggs directly from the wild nests amounts to larceny. Whatever other offense such an act may involve, it cannot, in my opinion, support a charge of larceny.[2]

[2] Laurance, J., concurred, and Ridley, Darling, and Channell, JJ., delivered concurring opinions which are omitted.

In indictments for arson, larceny, burglary, and rape, the words "burned," "took," "burglariously," and "ravished" are necessary, in indictments at common law. 1 Chitty, Cr. L. 242 et seq. In an indictment for a felony, the

STATE v. KEERL.

(Supreme Court of Montana, 1904. 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579.)

CALLAWAY, C.[3] The defendant has appealed from a judgment finding him guilty of murder in the second degree, and from an order denying his motion for a new trial. A number of errors are assigned.
* * *

After alleging the infliction of certain mortal wounds, the information continues, "of which said mortal wounds the said Thomas Crystal did then and there languish and languishing did live, and thereafter, on the 21st day of April, A. D. 1902, at the county of Lewis and Clarke, in the state of Montana, the said Thomas Crystal died." An information must be direct and certain as regards the party charged, the offense charged, and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Pen. Code, § 1834. It is not permissible to convict the defendant upon mere inferences; he must be directly, plainly, and specifically charged with the commission of a certain crime, and it must be proved substantially as alleged in order to convict him.

In order to convict an accused of murder, the fact of the killing by him as alleged must be proved beyond a reasonable doubt. Pen. Code, § 358. The fact that the defendant inflicted upon another human being a mortal wound deliberately, premeditatedly, with malice aforethought, and with the intent to kill the victim, is not sufficient to substantiate a charge of murder. The victim must die of the mortal wound, and within a year and a day after the stroke is received or the cause of death administered. Pen. Code, § 357. If the victim die of the mortal wound, but after a year and a day have elapsed since its infliction, the defendant may not be convicted of either murder or manslaughter. Neither can he be so convicted if, while the victim is languishing because of the mortal wound, death ensue from some cause not connected with or a consequence of the wound. For these reasons the information should directly allege that death resulted from the mortal wounds inflicted by the defendant.

This view being so clearly correct in principle, it would seem that no citation of authorities is necessary, but see Clark on Criminal Pro-

word "feloniously" is necessary, as is the word "treasonably" in an indictment for treason. See 2 Hawk. P. C. c. 25, § 55.

In some crimes the use of certain technical words sufficiently charges certain elements of the crime. Thus, the word "ravish" sufficiently charges force and violence, and lack of consent. Harman v. Commonwealth, 12 Serg. & R. (Pa.) 69 (1824). The word "adultery" expresses carnal knowledge. Helfrich v. Commonwealth, 33 Pa. 68, 75 Am. Dec. 579 (1859). And the use of the word "assault" makes it unnecessary to state the acts constituting the assault. State v. Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565 (1890).

[3] Part of this case is omitted.

cedure, 178; People v. Lloyd, 9 Cal. 55; Commonwealth v. Macloon, 101 Mass. 1, 100 Am. Dec. 89; State v. Sundheimer, 93 Mo. 311, 6 S. W. 52; Maxwell's Criminal Procedure, 180; Bishop's New Criminal Procedure, §§ 527, 531, 532; Wharton's Criminal Law (10th Ed.) § 536. In Lutz v. Commonwealth, 29 Pa. 441, while an indictment containing language similar to the one at bar was sustained, the court say: "This indictment is not artistically expressed. Its grammatical construction is open to criticism, and it trenches hard on those rules of certainty which obtain in criminal pleading."

The Attorney General relies on the concluding clause of the information as supplying the defect, because it alleges, "and so the said James S. Keerl did in the manner and form aforesaid willfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought kill and murder the said Thomas Crystal." These words "are the mere conclusions drawn from the preceding averments. If the averments are bad, the conclusion will not aid them; if they are good, and sufficiently describe the crime as the law requires, * * * the formal concluding words are immaterial." Territory v. Young, 5 Mont. 244, 5 Pac. 248; State v. Northrup, 13 Mont. 522, 35 Pac. 228. We cannot give our approval to this information.

As this case must go back for a new trial, the information may be amended by leave of the court to conform to the views herein expressed.[4]

STATE v. CONLEY.

(Supreme Judicial Court of Maine, 1854. 39 Me. 78.)

At the March term, 1854, the prisoners were tried before Shepley, C. J., on an indictment as follows:

"State of Maine.

"Cumberland, ss.—At the Supreme Judicial Court, begun and holden at Portland, within and for the county of Cumberland, on the first Tuesday of March, in the year of our Lord one thousand eight hundred and fifty-four.

"The jurors for said state upon their oaths present that Martin Conley and John Conley, of Portland, in the county of Cumberland, laborers, on the twelfth day of February, in the year of our Lord one thousand eight hundred and fifty-four, at Portland in said county of Cumberland, with force and arms, in and upon one Thomas Guiner, feloniously, willfully and of their malice aforethought, did make an assault, and that they, the said Martin Conley and John Conley, then and there with certain dangerous weapons, to wit, certain wooden clubs, of the length of four feet and of the thickness of two inches,

[4] See, also, State v. McFadden, 48 Wash. 259, 93 Pac. 414 (1908). Cf. Lutz v. Commonwealth, 29 Pa. 441 (1857); Shay v. People, 22 N. Y. 317 (1860).

which they, the said Martin Conley and John Conley, then and there, in both of their hands had and held, the said Thomas Guiner, in and upon the front and upper part of the head of him, the said Thomas Guiner, then and there feloniously, willfully and of their malice aforethought, did strike and beat, giving unto him, the said Thomas Guiner, then and there with the said dangerous weapons, to wit, with the said wooden clubs, of the length of four feet and of the thickness of two inches, two mortal wounds, of which said mortal wounds he, the said Thomas Guiner, on the twenty-first day of February now last past, at Portland aforesaid in the county aforesaid, did languish and die. And so the jurors aforesaid, upon their oath aforesaid do say, that the said Martin Conley and John Conley, him, the said Thomas Guiner, in manner and form aforesaid, feloniously, willfully and of their malice aforethought, did kill and murder, against the peace of said state, and contrary to the form of the statute in such case made and provided." * * *

TENNEY, J.[5] * * * The fifth cause for the arrest of judgment is that the indictment contains no allegation of the length, breadth or depth of the wounds alleged to have been caused by the striking of the prisoners. When death is occasioned by a wound, it should be stated to have been mortal. It must appear from the indictment that the wound given was sufficient to cause the death; and for this reason, unless it otherwise appear, that the length and depth must be shown; but it is not necessary to state the length, depth or breadth of the wound, if it appear that it contributed to the party's death. Rex v. Mosley, 1 Ry. & Moody, C. C. 97. In the case referred to, there were several wounds, and it was held by Abbott, C. J., Best, C. J., Alexander, C. B., Graham, B., Bayley, J., Park, J., Burrow, J., Garrow, B., Hullock, B., and Gasalee, J., to be unnecessary to describe the length, breadth or depth of the wounds. Holroyd, J., and Littledale, J., were of a contrary opinion. * * *

Another ground for the arrest of the judgment is that it is not alleged in the indictment that the wounds described therein, or either of them, were given, caused or produced by the striking alleged, the necessary averment "by the stroke or strokes aforesaid" being omitted. It is averred in the indictment that the prisoners then and there with the dangerous weapons, etc., which they then and there in both their hands, had and held, the said Thomas Guiner, in and upon the front and upper part of the head, etc., did strike and beat, giving unto him, etc., then and there with said dangerous weapons, etc., two mortal wounds, of which said mortal wounds, the said Thomas Guiner, on the 21st day of February aforesaid, did languish and die. It is not easy to perceive in what respect the allegation fails to be sufficient. It is full, that the prisoners struck and beat the deceased, giving unto him two mortal wounds with the dangerous weapons, before described, which they in both their hands had and held, of which said mortal

[5] Part of this case is omitted.

wounds the deceased died. It necessarily follows, from the facts alleged in language sufficiently accurate and technical, that the strokes inflicted by the prisoners caused mortal wounds, which produced the death charged in the indictment.

The eighth objection to the indictment is that it does not contain the allegation that the deceased, of the said mortal wounds, on and from the said twelfth day of February, etc., until the twenty-first of the same February, did suffer and languish, and languishing did live. The prisoner's counsel, in support of this objection, refer to certain precedents of forms of indictment, without any other authority that this allegation is essential. It is held, however, that the time both of the stroke and death should be stated on the record, the former because the escheat and forfeiture of lands relate to it, the latter in order that it may appear that the death took place within a year and a day after the mortal injury was received. 1 Chitty's Cr. Law, 222; 3 Ibid. 736. It being alleged in the indictment now under consideration that the deceased did languish and die on the twenty-first day of February, in the year of our Lord 1854, of the mortal wounds inflicted on the 12th day of the same month, in full, precise, and technical language, the reason of the principle is satisfied. And no rule of law which can be found being violated, the indictment is regarded sufficient in this respect. * * *

Exceptions and motion overruled.[6]

[6] "An indictment of murder or manslaughter hath these certainties and requisites to be added to it more than other indictments, for it must not be only felonice, and ascertain the time of the act done, but must also:

"(1) Declare how, and with what it was done, namely, cum quodam gladio, etc.

"Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as poisoning, or strangling, it doth not maintain the indictment upon evidence. 2 Co. Inst. 319; Co. P. C. p. 48.

"So if A. be indicted for poisoning of B. it must allege the kind of poison, but if he poisoned B. with another kind of poisoning, yet it maintains the indictment, for the kind of death is the same.

"(2) He must shew in what hand he held his sword.

"If an indictment runs thus, that cum quodam gladio, quem in dextra sua tenuit, percussit, without saying in dextra manu, for this cause an indictment was quashed. P. 44 Eliz. B. R., Cuppledike's Case, 3 Coke, 5b.

"(3) Regularly it ought to set down the price of the sword or other weapon, or else say nullius valoris, for the weapon is a deodand forfeited to the king, and the township shall be charged for the value if delivered to them.

"But this seems not to be essential to the indictment.

"(4) It ought to show in what part of the body he was wounded, and therefore if it be super brachium, or manum, or latus, without saying whether right or left, it is not good. Long's Case, 5 Coke, 121b.

"So if it be in sinistro bracio, where it should be brachio, it is not good, because insensible. T. 31 Eliz. B. R., Webster's Case.

"So if the wound be laid circiter pectus, it is not good. T. 29 Eliz., Clenche's Rep. 10. Super partes posteriores corporis not good. H. 23 Car. I, B. R., Savage's Case, Style, 76.

"But super faciem, or caput, or super dextram partem corporis, or in insima parte ventris are certain enough. Long's Case, 5 Coke, 121b.

"(5) Regularly the length and depth of the wound is to be shewed, but this is not necessary in all cases, as, namely, where a limb is cut off. Haydon's

PEARCE v. STATE.

(Supreme Court of Tennessee, 1853. 1 Sneed, 63, 60 Am. Dec. 135.)

TOTTEN, J., delivered the opinion of the court.[7]

James Pearce was convicted in the circuit court of Rhea on a presentment for illegal voting. He moved for a new trial, and in arrest, and, the motions being severally overruled, he appealed in error to this court. * * *

The presentment avers, in substance, that in the election for President and Vice President of the United States, in 1848, the defendant unlawfully and knowingly voted in the county of Rhea; he, the defendant, "not being a qualified voter in and for said county of Rhea."

The act of 1844 (chapter 31, § 1) provides that if a person vote at any election held under the Constitution and laws of this state, "such person not being at the time a qualified voter of the county in which he so votes, he shall be adjudged guilty of a misdemeanor."

We think the presentment bad. The nature and cause of the accusation are not well stated. Const. art. 1, § 9. The presentment is in the words of the statute; and the words are, "a qualified voter." That is not a fact, but a legal result; and for the facts which constitute a qualified voter we are to refer to the Constitution and laws, from which it will be seen that there are several grounds of disqualification: (1) If he be not a free white man, twenty-one years of age. (2) If he be not a citizen. (3) If he has not resided in the county six months as a citizen thereof.

Now, for which of these causes was the defendant disqualified? The presentment does not inform him, and the cause can only appear in the proof, when he may be taken by surprise, and be wholly unprepared to make his defense, however just and valid it may be.

The rule is that "the indictment must charge the crime with cer-

Case, 4 Coke, 42a. So it may be also a dry blow, and plaga is applicable to a bruise or a wound.

"But though the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be done, as near the truth as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it, it is sufficient to maintain the indictment.

"(6) It is usual to allege the party stricken to have been in pace Dei et domini regis, but not necessary to be inserted. Haydon's Case, 4 Coke, 41b." 2 Hale, P. C. 185, 186.

Statutes have been very generally adopted making it unnecessary to set forth the means employed in causing the death. See Catchcart v. Commonwealth, 37 Pa. 108 (1860).

"The fourth exception was because the depth and breadth of the wound was not shown, as is always usual in indictments, so that it may appear to the court that the wound was mortal. But it was answered and resolved by the court that it could not be in this case, because all the pan of the knee was entirely cut off; as if an arm or leg is cut off, or if a man is beheaded, the depth or breadth of the wound shall not be shown." Haydon's Case, 4 Coke, 41 (1585).

7 Part of this case is omitted.

tainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime. A statement of a legal result is bad." 1 Chit. Cr. L. 228. A conclusion of law need not be stated. It is the facts upon which it is founded that are necessary and material. 1 Chit. Cr. L. 231.

We may further observe that where the act is not, in itself, necessarily unlawful, but becomes so by other facts connected with it, the facts in which the illegality consists must be set forth and averred. 1 Chit. Cr. L. 229.

Now, the act of voting is not necessarily illegal, but may become so for some of the causes before stated; and, in order that the charge may be perfect, such cause must be set forth and averred in the indictment or presentment. The ground of disqualification not being averred in the present case, the judgment will be reversed, and the motion in arrest sustained.

Judgment reversed.

STATE v. HADDONFIELD & C. TURNPIKE CO.

(Supreme Court of New Jersey, 1900. 63 N. J. Law, 97, 46 Atl. 700.)

Case certified from court of oyer and terminer, Camden county.

The Haddonfield & Camden Turnpike Company was indicted for neglecting to keep its road in repair, and demurred to the indictment. Case certified, and court advised that defendant was entitled to judgment on its demurrer.

GUMMERE, J. The defendant is indicted for neglecting to keep its turnpike road in repair. The ground of demurrer is that the indictment fails to show how the defendant's obligation to keep its road in repair arises.

The pleading demurred to, after alleging that the defendant is in possession of the turnpike, and that the same is out of repair, charges that the defendant is "by law holden and bound the said turnpike road to repair and amend," etc. The rule with relation to the necessity of setting forth in an indictment how the duty arose for the neglect to perform which the defendant is presented is thus stated in State v. Hageman, 13 N. J. Law, 314: "Where an offense consists in an omission to do some act, the indictment must show how the defendant's obligation to perform that act arises, unless it is a duty connected by law to the office which the defendant sustains." To the same effect is State v. President, etc. of New Jersey Turnpike Co., 16 N. J. Law, 222.

It is contended on behalf of the state that the legal duty of the defendant to repair and amend its turnpike is created by its charter, and that, as the charter is a law of the state, the allegation of the indictment is sufficient, the case being within the exception mentioned in State v. Hageman. This contention would be sound if the charter of

the company was a public act, provided it casts upon the company the duty of repair. But the charter is a private act, and we cannot take judicial notice of its contents. 1 Chit. Pl. 216. The indictment should have set out the charter provision, from which the duty of the defendant to repair and amend its road is claimed to arise, and is fatally defective in not doing so.

The Camden oyer and terminer is advised that the defendant is entitled to judgment on its demurrer.

HARMAN v. JACOB.

(Upper Bench, 1651. Style, 256.)

In an arrest of judgment upon a verdict given against an alien in an indictment upon the statute of 22 H. VIII, c. 13, for using a trade, exception was first taken. * * * 2dly. The indictment doth not say that he is alienatus extra Angliam. And this was held a good exception.[8]

COMMONWEALTH v. HERSEY.

(Supreme Judicial Court of Massachusetts, 1861. 2 Allen, 173.)

Indictment for murder.

BIGELOW, C. J.[9] The motion in arrest of judgment in the present case is founded on the omission to aver that the defendant, in administering poison to the deceased, did it with an intent to kill and murder. * * *

There can be no doubt that, in every case, to render a party responsible for a felony, a vicious will or wicked intent must concur with a wrongful act. But it does not follow that, because a man cannot commit a felony unless he has an evil or malicious mind or will, it is necessary to aver the guilty intent as a substantive part of the crime in giving a technical description of it in the indictment. On the contrary, as the law presumes that every man intends the natural and necessary consequences of his acts, it is sufficient to aver in apt and technical words that a defendant committed a criminal act, without alleging the specific intent with which it was done. In such case, the act necessarily includes the intent. Thus, in charging the crime of burglary, it is not necessary to aver that the breaking and entering a house was done with an intent to steal. It is sufficient to charge the breaking and entering and an actual theft by the defendant. The reason is that the fact of stealing is the strongest possible evidence of the intent, and the allegation of the theft is equivalent to an averment of that intent. Commonwealth v. Hope, 22 Pick. 1, 5; 2 East, P. C. c. 15, § 24.

[8] Part of this case is omitted.

[9] Part of this case is omitted.

So in an indictment for murder by blows or stabs with a deadly weapon, it is never necessary to allege that they were inflicted with an intent to kill or murder. The law infers the intent from proof that the acts were committed, and that death ensued. The averment, therefore, of the criminal act comprehends the evil or wicked intention with which it was committed. The true distinction seems to be this: When by the common law or by the provision of a statute a particular intention is essential to an offense, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. On the other hand, if the offense does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved. In such case, the intent is nothing more than the result which the law draws from the act, and requires no proof beyond that which the act itself supplies. 1 Stark. Crim. Pl. 165; 1 Chit. Crim. Law, 233; King v. Philipps, 6 East, 474; 1 Hale, P. C. 455; Commonwealth v. Merrill, 14 Gray, 415, 77 Am. Dec. 336.

To illustrate the application of the rule, take the case of an indictment for an assault with an intent to commit a rape. The act not being consummated, the gist of the offense consists in the intent with which the assault was committed. It must therefore be distinctly alleged and proved. But in an indictment for the crime of rape no such averment is necessary. It is sufficient to allege the assault, and that the defendant had carnal knowledge of a woman by force and against her will. The averment of the act includes the intent, and proof of the commission of the offense draws with it the necessary inference of the criminal intent. The same is true of indictments for assault with intent to kill, and murder. In the former, the intent must be alleged and proved. In the latter, it is only necessary to allege and prove the act.

The application of this principle to the case at bar is decisive of the question raised by the present motion. There is nothing in the nature of the crime of murder by poison to distinguish it from homicide by other unlawful means or instruments, so as to render it necessary that it should be set out with fuller averments concerning the intention with which the criminal act was committed. If a person administers to another that which he knows to be a deadly poison, and death ensues therefrom, the averment of these facts in technical form necessarily involves and includes the intent to take life. It is the natural and necessary consequence of the act done, from which the law infers that the party knew and contemplated the result which followed, and that it was committed with the guilty intention to take life.

It was urged by the counsel for the prisoner, as an argument in support of the insufficiency of the indictment, that every fact stated in the indictment might have been done by the defendant, and yet he

might have committed no offense; that is, that a person might administer to another that which he knew to be a deadly poison, from which death ensued, innocently and without any intent to do bodily harm. In a certain sense this is true. A physician, for example, might in the exercise of due care and skill give to his patient a medicine of a poisonous nature, in the honest belief that it would cure or mitigate disease, but which from unforeseen and unexpected causes actually causes death. And the same is true of many other cases of homicide produced by other means than poison. Take the case of a murder alleged to have been committed by stabs or cuts with a knife. Such wounds may be inflicted innocently and for a lawful purpose. A surgeon in performing a delicate and difficult operation, by a slight deflection of the knife, which the most cautious skill could not prevent, might inflict a wound which destroys life. But it has never been deemed necessary, because certain acts which cause death may be done without any wicked or criminal intent, to aver in indictments for homicide that the person charged acted with an intent to take life. The corrupt and wicked purpose with which a homicidal act is done is sufficiently expressed by the averment that it was committed willfully and with malice aforethought; and this allegation may be always disproved by showing that the act happened per infortuniam, or was otherwise excusable or justifiable.

Motion in arrest of judgment overruled.

REX v. TRIGG.

(Court of King's Bench. Style, 124.)

The court was moved to quash a presentment against Trigg for not going before a justice of peace to take the oath of an headbrow to which office he was chosen at a leet. The exceptions taken against it were, 1. That it doth not appear that any notice was given to him to go before the justice. 2dly, it appears not that the justice had authority to administer the oath. For the first exception the presentment was quashed.[10]

STATE v. HODGES.

(Court of Appeals of Maryland, 1880. 55 Md. 127.)

ROBINSON, J., delivered the opinion of the court.[11]

The defendant in error was indicted for receiving stolen goods, knowing them to be stolen. A demurrer was filed to the indictment, and the court below sustained the demurrer and quashed the indictment. * * *

[10] Accord: State v. Lemay, 13 Ark. 405 (1853); State v. Munch, 22 Minn. 67 (1875).

[11] Part of this case is omitted.

The offense in this state has always been considered as a misdemeanor. Kearney's Case, 46 Md. 422. It was not necessary therefore to allege in the indictment that the property in question was feloniously received by the defendant in error. * * *

Where the offense charged is an offense at common law, and is itself manifestly illegal, the averment that it was done unlawfully may not be necessary. 1 Chitty, Crim. Law, 160; 2 Hawk. book 2, § 25. But the mere receipt of stolen goods, knowing them to be stolen, was not per se an offense at common law, because the owner may lawfully receive back his own goods, knowing them to be stolen, provided there be no agreement to favor the thief; or one may lawfully receive stolen property for the purpose of keeping the goods for the owner. 2 East's Crown Law, ch. 25, § 141; 1 Hale, 650. And accordingly we find in Chitty, Archbold, and in fact in all the books of forms, the averment that the goods were unlawfully received. * * *

If it be an offense created by statute, it is only necessary to describe it in the language of the statute. In this state, the Code merely prescribes the punishment for receiving stolen goods, and does not in any manner change the nature or character of the offense itself. It is necessary, therefore, to set out in the indictment all the circumstances necessary to constitute the offense at common law, and inasmuch as it was necessary at common law, to constitute the offense, that the party charged should receive the property unlawfully, we are of opinion that it must be so averred in the indictment. The indictment in this case does not allege that the goods were unlawfully received by the traverser, and the judgment must therefore be affirmed.[12]

[12] If malice be a necessary ingredient of the offense, malice must be alleged. Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544 (1854).

So, when knowledge of certain facts is essential to the offense, the indictment must aver such knowledge. People v. Behee, 90 Mich. 356, 51 N. W. 515 (1892).

"In the case of Wong v. Astoria, 13 Or. 538, 11 Pac. 295, it was held that to allege that an act was done 'willfully and unlawfully' was equivalent to alleging that it was done 'knowingly.' In the case of Weinzorpflin v. State, 7 Blackf. (Ind.) 186, 195, it is said among other things, as follows: '"Feloniously" is substituted for it [the word "unlawfully"] in this indictment, and is not tantamount to it, but is a word of far more extensive criminal meaning. The act complained of could not have been done feloniously, and not unlawfully done.' In the case of Carder v. State, 17 Ind. 307, it is said 'that the word "feloniously," in the connection in which it was used in the indictment, was identical in its import with the word "purposely."' In the case of Commonwealth v. Adams, 127 Mass. 15, 17, it is said: 'But the allegation that the defendant maliciously and feloniously incited and procured principal to commit the felony ex vi termini imports that she acted with an unlawful intent.' In the case of Allen v. Inhabitants, 3 Wils. 318, it is said as follows: 'Here he (the prosecutor) has alleged in his declaration * * * that the same was committed and done feloniously; and that act, which was committed feloniously, was certainly done willfully, unlawfully, and maliciously, for doing an act feloniously is doing it malo animo, viz., with malice.'" Valentine, J., in State v. Bush, 47 Kan. 201, 27 Pac. 834, 13 L. R. A. 607 (1891).

In Kitchinman's Case, Style, 374 (1653), Roll, C. J., said: "It is said to be preferred malitiose and it cannot be malitiose except it be also falsely."

STATE v. DORAN.

(Supreme Judicial Court of Maine, 1904. 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278.)

WHITEHOUSE, J.[13] It is alleged in the indictment that the defendant, "with force and arms, the car numbered 18,656 of the Boston & Maine Railroad * * * feloniously, willfully, and maliciously did attempt to break and enter for the purpose of committing a felony." The jury returned a verdict of guilty, and the defendant moved in arrest of judgment; among other reasons, "because no specific offense against the laws of this state is alleged against the said Doran in said indictment, and that no judgment could be rendered upon the verdict in said court." The motion was overruled by the presiding judge, and the case comes to this court on exceptions to this ruling. * * *

Where the offense is created by statute, and the facts constituting it are fully set out, it is undoubtedly sufficient to charge the offense in the language of the statute without further description. 1 Bish. Cr. Proc. § 611. But "in all criminal prosecutions the accused shall have a right * * * to demand the nature and cause of the accusation." Const. Me. art. 1, § 6. He has a right to insist that the facts alleged to constitute a crime shall be stated in the indictment against him with that reasonable degree of fullness, certainty, and precision requisite to enable him to meet the exact charge against him, and to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense.

Hence, if a statute creating an offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictment. "And where a more generic term is used, or where the words of the statute by their generality may embrace cases which fall within the terms but not within the spirit or meaning thereof, the specific facts must be alleged to bring the defendant precisely within the inhibition of the law." Enc. of Pl. and Prac. vol. 10, p. 487; Wharton's Cr. Pl. and Prac. § 220. Indeed, it is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the indictment.

With respect to indictments for attempts to commit offenses Mr Bishop says: "An attempt is an intent to do a particular criminal thing with an act towards it falling short of the thing intended [1 Bish. Cr. Law, § 728], and on principle we see that we must set out the act which was committed and the specific intent which accompanied it." Bish. on Stat. Cr. § 394; 2 Crim. Proc. §§ 1, 92; Directions and Forms, § 100. * * *

[13] Part of this case is omitted.

Again, as already noted, the indictment fails to specify the particular felony which it is alleged the defendant intended to commit. This is another fatal defect. The word "felony" is not the name of any distinctive offense. It is a generic term, employed to distinguish certain high crimes, as murder, robbery, rape, arson, and larceny, from other minor ones, known as "misdemeanors." The averment that the defendant broke and entered the car for the purpose of committing a felony wholly failed to apprise him of the specific offense which it is claimed he intended to commit. Whether it would be contended by the state that he intended to commit murder, or robbery, or rape, or larceny, he is not informed. Upon the trial of such an indictment he was liable to be oppressed by the introduction of evidence which he could not anticipate or be prepared to meet. * * *

Motion sustained. Judgment arrested.[14]

II. Averment of Time and Place of the Offense

ANONYMOUS.

(Court of King's Bench, 1486. Year Book 2 Hen. VII, 10, pl. 6.)

In the King's Bench upon an indictment taken in the sheriff's tourn it was found that one J. with force and arms on the first day of May at H. and the fourth day of May at C. in D. made an assault, beat, and grievously maltreated, and one horse of the value of, etc. then and there being, feloniously stole, took and carried away, and because there were in the commencement two several days and places, and in the conclusion it was then and there one horse, etc. and there cannot be a felony laid in two places at two times, without special matter. (For a felony cannot be done except at one time and in one place, and it is uncertain, in which of the said places, or on which of the said days it is intended, and so it is uncertain.) And because of this, as to the felony let him go quit.

ANONYMOUS.

(Upper Bench, 1655. Style, 448.)

The court was moved to quash an indictment grounded upon the statute of 5 Eliz. preferred against one for using the trade of a draper, not having served as an apprentice in that trade, according to the statute, upon these two exceptions: 1. It is said he used the trade in the year 1653, and doth not say the year of our Lord. 2dly. It is not said that the jury was returned, nor whence they were, and both exceptions were held good by Roll, Chief Justice, and the indictment was thereupon quashed.

[14] Accord; Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544 (1854).

REX v. MASON.

(Court of King's Bench, 1680. 2 Show. 126.)

Indictment against the defendant on the statute 33 Hen. VIII, c. 9, for shooting in a gun, quod non habens terras aut tenementa ad valorem nono die Aprilis anno, &c. apud, &c. sagittavit.

Exception was taken and allowed, for that "he not having" shall be intended to relate to the time of the indictment, and not to the time of the fact.

And therefore quashed.[15]

MOLETT v. STATE.

(Supreme Court of Alabama, 1859. 33 Ala. 408.)

A. J. WALKER, C. J.[16] The indictment, found on the 17th November, 1857, alleges the offense to have been committed before the finding of the indictment and after the 1st day of March, 1856. The offense may have been committed after the 1st day of March, 1856, and not within 12 months before the finding of the indictment. The indictment fails, therefore, to show the commission of the misdemeanor within the period prescribed by the statute of limitations. Before the Code, this would have been a fatal objection; but it is not now necessary to make any averment that the indictable act was done within the time mentioned in the statute of limitations. No specification of the time is necessary, unless time is a material ingredient of the offense. Code, § 3512; and form No. 1, page 698.[17]

The forms prescribed by the Code make sufficient an allegation that the offense was committed before the finding of the indictment. It cannot vitiate that the indictment, instead of embracing within its allegation all past time, limits to a certain specified day in the past the period within which the offense was committed. * * *

The judgment of the court below is reversed, and the cause remanded.

15 Accord: Sikes v. State, 67 Ala. 77 (1880).

16 Part of this case is omitted.

17 Many states have similar statutes. See State v. Ackerman, 51 La. Ann. 1213, 26 South. 80 (1899); State v. Peters, 107 N. C. 876, 12 S. E. 74 (1890). See, also, Fleming v. State, 136 Ind. 149, 36 N. E. 154 (1894).

Compare Ruge v. State, 62 Ind. 388 (1878).

STATE v. BEATON.

(Supreme Judicial Court of Maine, 1887. 79 Me. 314, 9 Atl. 728.)

On exceptions by respondent from Supreme Judicial Court, Lincoln county.

An appeal from the decision of a trial justice on a complaint and warrant for fishing for and catching lobsters in violation of law.

WALTON, J. Neither a complaint nor an indictment for a criminal offense is sufficient in law, unless it states the day, as well as the month and year, on which the supposed offense was committed. In this particular, the complaint in this case is fatally defective. It avers that "on sundry and divers days and times between the twenty-third day of September, A. D. 1885, and the thirtieth day of September, A. D. 1885," the defendant did the acts complained of. But it does not state any particular day on which any one of the acts named was committed. Such an averment of time is not sufficient. State v. Baker, 34 Me. 52; State v. Hanson, 39 Me. 337, and authorities there cited.

Exceptions sustained. Complaint quashed.

PETERS, C. J. and VIRGIN, LIBBEY, EMERY, and HASKELL, JJ., concurred.

STATE v. CITY OF AUBURN.

(Supreme Judicial Court of Maine, 1894. 86 Me. 276, 29 Atl. 1075.)

PETERS, C. J. The city of Auburn, having been indicted for its failure to open a highway laid out within its limits by county commissioners, claims, upon demurrer thereto, that the indictment found against them is insufficient in some respects.

It is contended that it is bad because the city of Auburn, so named in the indictment, is not described as a corporation of any kind, and more especially because there is no averment that the city of Auburn is situated within any county of this state. Such omissions are undoubtedly formal defects, indicating a want of care in the work of the pleader that is not to be commended. The omissions are supplied, however, to some extent by certain indirect allegations contained in the indictment. The way is alleged to have been laid out by the commissioners of Androscoggin county within the city of Auburn, and the indictment avers that it was found at a term of court begun and holden at Auburn within and for the county of Androscoggin. Aided by these implications, we deem it warrantable for us to determine as a matter of judicial knowledge that the city of Auburn described in the indictment is the municipal corporation of that name situated in our county of Androscoggin. The case of Com. v. Desmond, 103 Mass. 445, supports this view.

The indictment further alleges that the mandate of the commissioners required that the way should be opened and built by the city within three years from March 31, 1890, and that for the period of time between March 31, 1890, and March 31, 1893, as well as ever since, the city had wholly neglected to open and build the same; and it is contended by the defense that such an averment as to the time of the commission of the alleged offense is bad for its generality. In support of this objection the defense invokes the general principle of pleading, recognized in our own cases, that some particular day must be named in the indictment on which the alleged offense was committed, and that, too, even if the offense be set out with a continuando.

In our view, this criticism does not fairly apply to an indictment like the present. The principle referred to applies mostly to offenses of commission, and not to those of omission; to acts done, rather than acts omitted to be done; to offenses accomplished by active, and not passive, means. Of course, the principle contended for would apply as strongly to an act of nonfeasance as to an act of misfeasance, when such act can be logically and correctly described as having been done on some particular day, or upon some continuous days. In the present case it would not be true to charge the offense as committed on either the first or the last day of the three years allowed the city within which to construct the contemplated road, or on any intermediate day or days, or as committed upon any time short of the whole period of three years. The offense was growing for three years, culminating at the expiration of that period. The ruling of the court on an analogous question in Smiley v. Inhabitants of Merrill Plantation, 84 Me. 322, 24 Atl. 872, sustains, as far as it goes, our conclusion here.

Exceptions overruled.[18]

STATE v. KENNEDY.

(Court of Errors and Appeals of Louisiana, 1845. 8 Rob. 590.)

KING, J. * * *[19] The indictment, after stating the mortal blow, with the usual averments of time and place, proceeds: "Of which mortal wound, so given by the said Samuel Kennedy, with the deadly weapons aforesaid, to the said Benjamin Wood Wait, the said Benjamin Wood Wait did then and there suffer and languish, and languishing did live, and a few hours after did die of the said mortal wound."

No principle appears to be better settled than that, in indictments for high offenses, those termed felonies at common law, the averment of

[18] "Another branch of this objection viz., that the time of committing the offense is not certainly averred, by the words 'on or about,' we consider answered by the remarks already made. The two latter words in this averment have no meaning in this place, and are surplusage." Church, C. J., in Rawson v. State, 19 Conn. 292 (1848). Accord: Under statutes. State v. Hoover, 31 Ark. 676 (1877). But see State v. Baker, 34 Me. 52 (1852); State v. O'Keefe, 41 Vt. 691 (1869).

[19] Part of this case is omitted. Nicholls, J., dissented.

time and place is to be repeated to every issuable and triable fact. When these have been once set forth with certainty, they may, in every subsequent averment, be referred to by the words "then and there," which are deemed equivalent to a repetition of the time and place. The time should be stated with such certainty that no doubt can be entertained of the period really intended; and such is the precision required in this respect that any uncertainty in the averment of time and place will vitiate the indictment.

The material facts in murder are the mortal stroke and the consequent death, and the death must appear upon the record to have occurred within a year and day from the time when the mortal stroke was given. The averment, then, of each of these material facts must, under the well-established rules of criminal pleading, be accompanied by an allegation of a certain time and place. Thus, to aver that the assault was made on two days, as on the 1st and 2d of May, or on an impossible day, is such an uncertainty as will vitiate the indictment.

If an indictment for murder state that A., at a given time and place, having a sword in his right hand, did strike B., it is bad, for the time and place relate to the having the sword, and it is not stated when or where the stroke was given.

A., at a certain time and place, made an assault upon B., et eum cum gladio percussit, was held to be bad, because it was not said adtunc et ibidem percussit; the copulative conjunction "and," without the repetition of the time and place to this material ingredient of the offense, being deemed insufficient. In misdemeanors the same strictness is not required. 1 Chitty, 218, 219; Starkie, Cr. Pl. 58, 62, 65; 2 Hale, 178; Archbold, Cr. Pl. 34; 2 Hawk. c. 23, § 88. * * *

It is therefore ordered that the judgment of the inferior court be reversed, that the verdict in the case be set aside, and the judgment thereon arrested.[20]

[20] The place of every material fact must be stated with sufficient certainty to show that the court has jurisdiction of the cause (State v. Johnson, 32 Tex. 96 [1869]), and to enable the defendant to prepare his defense, and to plead the judgment upon the indictment in bar of a second prosecution for the same offense (State v. Cotton, 24 N. H. 143 [1851]). It is usual to state the county in which the offense was committed; but it is sufficient, at least in indictments for offenses not capital (Commonwealth v. Springfield, 7 Mass. 9 [1810]), to give a more particular description of the place, as a certain town, if the court can take judicial cognizance of the fact that such place is entirely within the county (Vanderwerker v. People, 5 Wend. 530 [1830]).

If the jurisdiction of the court is not coextensive with the county, it is not sufficient to state that the offense was committed in the county. A more minute description of the place is necessary. People v. Wong Wang, 92 Cal. 277, 28 Pac. 270 (1891). So if the act alleged be a crime only when done in a particular locality, it must be averred that it was done in such locality. State v. Hogan, 31 Mo. 340 (1861). For the venue of offenses begun in one locality and completed in another, see Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 126 (1892); Morrissey v. People, 11 Mich. 327 (1863).

If a minor locality has been averred, it need not be proved as laid. Proof that the offense was committed anywhere within the jurisdiction of the court will suffice (Commonwealth v. Tolliver, 8 Gray [Mass.] 386, 69 Am. Dec. 252 [1857]), unless the statement of the minor locality is necessary to a proper

III. Description of Persons Connected with the Offense

REX v. ————.

(Court for Crown Cases Reserved, 1822. Russ. & R. 489.)

The prisoner was indicted at the Old Bailey sessions in January, 1822, by the description of a person, whose name was to the jurors unknown. The offense with which he was charged was that of publishing a blasphemous and seditious libel.

It appeared that, when apprehended, he refused to declare his name before the magistrate, and the prosecutors, not being able to discover his name, indicted him as a man whose name was unknown to the jurors. When called to the bar, the indictment was read to him, and he then refused to plead, and was remanded. At the following sessions, in the month of February, the prisoner was again called to the bar, and by the advice of his counsel put in a demurrer in writing to the indictment. The prosecutors had time given them, until the next morning, to reply; but, before they could do so, the prisoner by his counsel moved the court to be permitted to withdraw his demurrer, which was granted; and being then called on for his plea, he pleaded not guilty; and, being told that he must plead by some name, he refused to give in any name. The learned recorder was of opinion that his plea could not be received without a name, and the prisoner was again remanded for want of a plea. At the following sessions he was again called on to plead, and again pleaded not guilty, but refused to put in that plea by any name. He was again told that the court could not receive his plea, unless he would plead by some name; and, as he persevered in his refusal, he was again remanded.

As this case appeared to be without precedent and might materially affect the administration of justice, the learned recorder requested the

description of the offense. (People v. Slater, 5 Hill [N. Y.] 401 [1843]. Commonwealth v. Heffron, 102 Mass. 148 [1869]). Cf. State v. Verden, 24 Iowa, 126 (1867). If such description is essential, it must be proved as described, even though the description be unnecessarily minute. State v. Kelley, 66 N. H. 577, 29 Atl. 843 (1891). Where the venue has been properly stated in the caption, or commencement, it is sufficient to charge that the act was done "then and there" (State v. Slocum, 8 Blackf. [Ind.] 315 [1846], or "in the county aforesaid" (Eaves v. State, 113 Ga. 749, 39 S. E. 318 [1901]).

St. 14 & 15 Vict. c. 100, § 23, provides: "It shall not be necessary to state the venue in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment: Provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment. * * *" More or less similar statutes have been enacted in some of the United States. See State v. Keel, 54 Mo. 182 (1873). Code Cr. Proc. N. Y. § 284, makes it a requisite for a valid indictment that "it can be understood therefrom that the crime was committed at some place within the jurisdiction of the court." See People v. Horton, 62 Hun, 610, 17 N. Y. Supp. 1 (1892). A similar provision is contained in Comp. Laws Nev. § 4208. See State v. Buralli, 27 Nev. 41, 71 Pac. 532 (1903).

opinion of the judges upon the following points: First, whether the prisoner could be admitted to put a plea on the record without a name; secondly, whether such a plea should be treated as a mere nullity, and the prisoner be remanded from time to time, as in contempt for not pleading; thirdly, whether the refusal to plead by name would entitle the court to enter up judgment by default; and, fourthly, whether in case the prisoner should ultimately plead by name, the court could proceed to try him upon this indictment or should quash the indictment as defective, and direct a fresh indictment to be preferred against him by the name by which he might plead.

In Trinity term, 1822, this case being presented for consideration, some of the learned judges, before whom it was discussed, suggested that the prisoner might be indicted as a person whose name was unknown, but who was personally brought before the jurors by the keeper of the prison. An indictment was preferred accordingly, and the prisoner was convicted.

BARNESCIOTTA v. PEOPLE.

(Supreme Court of New York, 1877. 10 Hun, 137.)

DAVIS, P. J.[21] The plaintiffs in error were indicted for keeping a disorderly house. The plaintiff in error John Barnesciotta was named in the indictment by that name, followed by the words, "otherwise called Garibaldi." On being arraigned, his counsel read and filed the following plea:

"Now comes the defendant, John Barnesciotta, and pleads to the indictment, that he is not now, and never was, known by the name of Garibaldi, which he verifies. John Barnesciotta.

"Sworn this 25th day of September, 1876.

"Wm. F. Howe, Commissioner of Deeds, N. Y."

The district attorney filed a demurrer to said plea, and the said plaintiff in error joined in demurrer. The court overruled the demurrer, and gave judgment thereon for the people. The demurrer was properly overruled. The true name preceded the alias dictus, and in such a case a plea in abatement will not be sustained. Reid v. Lord, 4 Johns. 118. It was quite immaterial whether the plaintiff in error was ever known by the name of Garibaldi, and the indictment did not so aver. If his true name be John Barnesciotta, as the plea in abatement must be taken to admit, then the alias dictus becomes wholly immaterial, and is not capable of working prejudice to the plaintiff in error.

Besides, the plea was defective in form. It does not aver the true name except argumentatively, and does not aver that he is not indicted by his true name; and it does not meet the averment of the indictment, which is not that the defendant was known by the name of "Garibaldi," but that "John Barnesciotta" was otherwise called "Gari-

[21] Part of this case is omitted.

baldi," which may be, and probably was, a nickname by which he was sometimes called by his associates. There is no reason for interferance with the conviction or judgment on this ground. The demurrer was a proper mode of disposing of the plea on the record. Rex v. Clark alias Jones, 1 D. & R. 43. * * *

Judgment and conviction affirmed.[22]

COMMONWEALTH v. BUCKLEY.

(Supreme Judicial Court of Massachusetts, Plymouth, 1887. 145 Mass. 181, 13 N. E. 368.)

Exceptions from superior court, Plymouth county; Thompson, Judge.

Indictment charging that the defendants, on a certain day, to wit, at Brockton, on May 14, 1887, "knowingly, willfully, and maliciously did verbally threaten to accuse one Frank E. White, of Brockton, aforesaid, of having committed the crime of burning a building not his own, to wit, the store of John D. White, by words then and there knowingly, willfully, and maliciously spoken of and to the said Frank E. White, substantially as follows: 'You [meaning the said Frank E. White] are the man that set the fire, and, unless you give us one hundred dollars, we will make it hot for you. We will make a jail bird of you'—with intent then and there to extort money, to wit, the sum of one hundred dollars, from him, the said Frank E. White, against the peace," etc. At the trial in the superior court, it was proved, but the attention of the court was not called to the fact until after the commencement of the charge, that the name of the person referred to and designated in said indictment as Frank E. White was Frank A. White, and not Frank E. White, and there was no evidence tending to show that said Frank A. White had ever been known or called Frank E. White, until so designated in the indictment; and thereupon the defendants asked the court to rule that there was a variance between the allegations in said indictment and the proof, and that, by reason of said variance, the jury should return a verdict of not guilty. The court refused to so rule. * * *[23]

HOLMES, J. The name of the person threatened is necessary to the identity of the offense charged in the indictment, and therefore must be proved as set forth. Com. v. Mehan, 11 Gray, 321. It is settled in this commonwealth that a middle name or initial is part of the name, and a variance in regard to it is fatal. Com. v. Perkins, 1 Pick. 388; Com. v. Hall, 3 Pick. 262; Com. v. Shearman, 11 Cush. 546. The ruling that there was no variance if Frank A. White was the person called Frank E. White in the indictment, probably went upon the

[22] See, also, Falkner v. State, 151 Ala. 77, 44 South. 409 (1907). Evans v. State, 62 Ala. 6 (1878).

[23] Part of the statement of facts is omitted.

ground that the E. might be rejected as surplusage, as is held in some states.[24] It cannot be said as matter of law that A. and E. are the same. There was no evidence that the party was ever called Frank E. White.

Exceptions sustained. [25]

REGINA v. BISS.

(Court for Crown Cases Reserved, 1839. 2 Moody, 93.)

The prisoner was tried and convicted before Lord Abinger, at the Essex Lent assizes, 1839.

That she on the 15th of August, at the parish of Lutton, in the county of Essex, on an infant male child aged about six weeks, and not baptized, feloniously, willfully, and of her malice aforethought, did make an assault, and that she with her hands feloniously, etc., did force, cast, and throw said male child into a pond of water there, by means whereof said male child in, by, and with the waters of said pond was then and there choked, suffocated, and drowned, of which said choking, suffocating, and drowning said male child died; and that she the said male child, in manner and form aforesaid, feloniously, willfully, and of her malice aforethought did kill and murder.

[24] See State v. Manning, 14 Tex. 402 (1855); O'Connor v. State, 97 Ind. 104 (1884); People v. Cook, 14 Barb. (N. Y.) 259 (1852). It is held in some states that it is not necessary to insert the middle name or initial; but, if inserted, it must be correctly stated. Price v. State, 19 Ohio, 423 (1850); State v. Hughes, 1 Swan (Tenn.) 261 (1851).

[25] Accord: Reg. v. James, 2 Cox, C. C. 227 (1847). Cf. Rex v. ———, 6 Car. & P. 408 (1834).

The terms junior and senior are no part of the name, and the omission or insertion of either does not render the indictment defective. Rex v. Peace, 3 B. & Ald. 579 (1820); People v. Collins, 7 Johns. (N. Y.) 549 (1811). At least where it does not appear that there are two persons of the name, or that the party was misled. San Francisco v. Randall, 54 Cal. 408 (1880).

A person may be described either by his baptismal name or by a name by which he is commonly known. Wilson v. State, 69 Ga. 224 (1882); Alexander v. Commonwealth, 105 Pa. 1 (1884).

INITIALS.—Some of the earlier cases hold that an indictment is defective if, instead of stating the Christian name in full, it describes a person by the initials of his Christian names. Gardner v. State, 4 Ind. 632 (1853), and see Smith v. State, 8 Ohio, 294 (1838).

Later cases hold that, if he is known by his initials, his name need not be more fully stated. State v. McMillan, 68 N. C. 440 (1873); State v. Appleton, 70 Kan. 217, 78 Pac. 445 (1904). Others that the initials are sufficient in all cases. Eaves v. State, 113 Ga. 749, 39 S. E. 318 (1901).

The defendant must object by a plea in abatement, in which he states his true name, when the indictment states his name incorrectly. Smith v. State, 8 Ohio, 294 (1838); State v. Brunell, 29 Wis. 435 (1872); Verberg v. State, 137 Ala. 73, 34 South. 848, 97 Am St. Rep. 17 (1902). The misstatement of the name of a third person, when the name of such person is material, is a fatal variance (Collins v. State, 43 Tex. 577 [1875]), unless it is shown that the person was also known by the name alleged, in which case the question of variance is for the jury (Commonwealth v. Warren, 167 Mass. 53 [1896]), and may be taken advantage of by motion to quash or demurrer. But such misnomer is cured by verdict. State v. Rook, 42 Kan. 419, 22 Pac. 626 (1889); State v. McMillan, 68 N. C. 440 (1873); State v. Rudolph, 3 Hill, Law (S. C.) 257 (1837).

An objection was made by Mr. Dowling, the prisoner's counsel, that the indictment neither stated the name of the child, nor that the name was unknown to the jurors.

The question reserved was whether that were a good objection.

The case was considered by all the judges except VAUGHAN, J., GURNEY, B., WILLIAMS, J., and ERSKINE, J., in Easter term, 1839, and they all thought the objection good, and that the judgment ought to be arrested.[26]

REX v. FOSTER.

(Court for Crown Cases Reserved, 1820. Russ. & R. 412.)

The prisoner was tried before Mr. Baron Garrow at the Maidstone Lent assizes in the year 1820, for committing an unnatural crime on one John Whyneard.

The person on whom this crime was convicted, being called as a witness, said that his name was spelt Winyard, but it was pronounced Winnyard.

The prisoner was convicted, and received sentence of death, but execution was respited, in order that the opinion of the judges might be taken on the objection that the name of the witness was misspelt.

In Easter term, 1820, the judges took this case into consideration, and held the conviction right.[27]

STATE v. McDOWELL.

(Supreme Court of Indiana, 1841. 6 Blackf. 49.)

DEWEY, J. This was a prosecution against a justice of the peace for oppression under color of his office. The circuit court quashed the indictment on the motion of the defendant.

The objection urged against the indictment is that the defendant is not described by the addition of his degree, or mystery, and place of residence.

By the common law no addition was required in indictments against persons under the degree of a knight. 1 Chitt. C. L. 204. The statute of additions, 1 Hen. V, c. 5, enacts that defendants shall be described by adding to their names their estate, degree, or mystery, and place of residence, in all cases in which "the exigent shall be awarded."

[26] Compare Reg. v. Hogg, 2 Moo. & R. 380 (1841); Reg. v. Willis, 1 Den. C. C. 80 (1845).

[27] Whether the names are *idem sonans* is for the jury. Reg. v. Davis, 2 Den. C. C. 231 (1851). See, also, Commonwealth v. Warren, 143 Mass. 568, 10 N. E. 178 (1887).

It has been held, in the construction of this statute, that in prosecutions which cannot be attended by the process of outlawry, the indictment need not give the addition of the defendant. 1 Chitt. Cr. L. 206; Bac. Abr. Indictment, 2; Id. Misnomer, 2; Rex v. Brough, 1 Wils. 244; Cro. Eliz. 148. The exigent, being a step in the proceedings of outlawry, is unknown to our law.

It is, therefore, evident that the statute of additions, from its own terms, is not applicable to prosecutions in this state; and it is equally clear that the common law does not require the defendant to be described by his addition in our indictments.

The circuit court erred in quashing the indictment.[28]

IV. Description, Ownership, and Value of Property

The certainte of the name of the person to whom the offense is done, is also in most cases requisit. But yet if the endictment be quod bona et catalla cuiusdam hominis ignoti felonice cepit, or quendam ignotum felonice depredavit, it is good, because of the King's advantage of forfeiture thereby. Fitz. Endictment, 12.

You may see an endictment (Fitz. Endict. 9) quod A. verberavit, et XX Jaccos prety &c. was thought sufficient without showing to whom the Jackes did belong: whereat, M. Stanford (fol. 95) marveleth, saying that hee saw no cause why it should be good, unless it were for that the matter could not bee made more certaine. But peradventure certaintie in endictments, was not in those daies thought so needful as now it is holden. * * *

If the endictment be, quod A. verberavit B. and unum equum precy XX. s. felonice cepit, and doth not say, ipsius B. yet it is good enough. 30 H. 6, Fitz. Endict. 9. But if it be qd. unum equum prædict' J. cepit, and there were no mention of J. before, then it is void. 9 E. 4, 1.

If the goods of a man be taken and he maketh executors, and dyeth, the endictment shall be bona testatorius; but if they were taken after his death, it shall be bona testatoris in custodia executorum existentia:[29] if the indictment be quod A. furatus est tunicam hominis ignoti quem invenit mortuum, that is not good. 11 R. 2, Fitz. Endict.

[28] The statute of additions has been held to be in force in a few states. See 1 Bish. New. Cr. Prac. § 674. Act 14 & 15 Vict. c. 100, § 24, abolished the necessity for the addition.

Where the addition of defendant's degree, mystery, and residence is necessary, the omission is cured by pleading to the indictment. Rex v. Hannam, 1 Leach. C. C. 420 (1787). And a fortiori by verdict. Commonwealth v. Jackson, 1 Grant, Cas. (Pa.) 262 (1855).

[29] "Or it may be general bona ipsius A"—the executor. 2 Hale, P. C. 181. See, also, U. S. v. Mason, 2 Cranch, C. C. 410, Fed. Cas. No. 15,728 (1823); Crockett v. State, 5 Tex. App. 526 (1879). "A hog, the property of a married woman, living with her husband, who has possession of it, is not incorrectly described in the indictment for stealing it as the property of the husband." Manning, J., in Lavender v. State, 60 Ala. 60 (1877).

15. * * * If my goods be taken by a trespassour and an other taketh them from him, the endictment shall be bona of him which had the last possession.[30] But if I baile goods to one, from whom they be robbed, then it shall be bona of me in his keeping, Marr.[31] * * * If an endictment be, bona capellæ in custodia &c. or bona domus, or Ecclesiæ tempore vacationis, it is good. 7 E. 4, 14.[32]

The name (and value) of the thing in which the offence is committed, ought also to be comprised in the endictment: for an endictment of the taking bona et catalla, whether it be in trespas or felonie, is not good, for the uncertaintie what goods they be: and if it be of dead things, it may be bona et catalla, expressing the names thereof in certaintie; but if it be of things living, it shall not say, bona et catalla, but equum, bovem, ovem, &c.

Again the value (or price) of the thing is commonly to be declared in felonie, to make it appeare from petite larceny. * * * In all cases (saith M. Marr.) where the number ought to be expressed in the endictment, there also it must be said, prety, or ad valentiam: * * * Where it is of a live thing or things, it must be prety: and so of a dead thing in the singular number: but if it be of dead things in the plural number, then it must be ad valentiam, and not prety.[33] Againe if it be of a dead thing that goeth by weight or measure, the forme is to say prety and not ad valentiam.

If the endictment be of taking away coine which is not current, it shall say prety: otherwise if it is of money current, because that carrieth his value and price with it. If it be quod proditore fecit grossos, vel denarios, it shall be ad valentiam, and it shall not say, 20 libras in denarys, or in pecunia domini regis, but ad instar pecuniæ domini regis. Sundry other daintie and nice differences doth M. Marr. make. Lambard's Eirenarcha, 496.

REX v. KETTLE.

(Chelmsford Assizes, 1819. 3 Chit. Cr. Law [4th Ed.] 947a.)

The prisoner was indicted for stealing "one bushel of oats, one bushel of chaff, and one bushel of beans, of the goods and chattels of A. B., then and there found," and the proof was that these articles, at the time of the felonious taking, were mixed together. BAYLEY, J.,

[30] Accord: King v. State, 43 Tex. 351 (1875); Ward v. People, 3 Hill (N. Y.) 395 (1843).

[31] Or the ownership may be laid in the owner, or in the bailee. Kennedy v. State, 31 Fla. 428, 12 South. 858 (1893). Unless the owner be the thief, in which case the ownership should be laid in the bailee. Adams v. State, 45 N. J. Law, 448 (1883).

[32] See further, 25 Cyc. 96.

[33] "But this I take to be but clerkship, and not substantial." 2 Hale, P. C. 183.

held that the articles ought to have been described as mixed, thus: "A certain mixture, consisting of one bushel," etc., and he directed an acquittal on this account.[34]

REX v. FORSYTH.

(Court for Crown Cases Reserved, 1814. Russ. & R. 274.)

The prisoner was tried before Mr. Justice Dallas, at the Lent assizes for the county of Stafford, in the year 1814, on an indictment, the first count of which stated, that the prisoner * * * became bankrupt, and on 28th of same November, upon the petition of the before named persons, a commission of bankruptcy was issued, and that on 30th of same November, at Manchester, prisoner was declared a bankrupt, and notice thereof left at the dwelling house of prisoner, at Burslem aforesaid, * * * and that he, devising to cheat his creditors, did not at any of the said times, upon such his examination, truly disclose and discover all his estates and effects, as was his duty so to do, but, on the contrary thereof, then and there did conceal and kept secret a bed, six tables, etc. (enumerating many articles), and "one hundred other articles of household furniture, and a certain debt due from one John Taylor to the said prisoner to the value of twenty pounds and upwards."[35] * * *

The following objections were then taken to the indictment: * * *

Thirdly. That the household furniture, as well as the debt concealed, etc., were not stated in the indictment with sufficient certainty, the former being, "and one hundred other articles of household furniture," and the latter, "a certain debt due from one A. B. to the said prisoner." * * *

In Easter term, 7th May, 1814, all the judges met (except DAMPIER, J., who was absent) and held the indictment bad, on the ground of the property concealed not being all specified, and no distinct value having been put upon the articles enumerated. * * *[36]

[34] "I doubt the propriety of that decision [Rex v. Kettle]. I cannot help thinking that, if a man steal wine and water, he may be charged with stealing wine. The above principle would doubtless hold good, where the mixture was such as to produce a chemical change in the articles." Alderson, B., in Reg. v. Bond, 4 Cox, C. C. 234 (1850).

[35] Part of this case is omitted.

[36] "Upon an indictment for stealing printed books, as it has been observed by my Lord, it is not necessary to do more than to name so many printed books." Bayley, J., in Rex v. Johnson, 3 Maule & S. 555 (1815).

"An averment that the defendant conveyed a certain parcel of land in the city of Salem, without any other terms of description, is bad for uncertainty. * * * The defendant may have owned other parcels of land in the city of Salem, which he conveyed to the prosecutor on the day alleged." Bigelow, J., in Commonwealth v. Brown, 15 Gray (Mass.) 190 (1860). See, also, State v. Malloy, 34 N. J. Law, 410 (1871).

STATE v. BASSETT.

(Supreme Court of Louisiana, 1882. 34 La. Ann. 1108.)

BERMUDEZ, C. J.[37] The defendant was convicted of larceny and sentenced to hard labor.

On appeal he complains, as he did in the lower court: * * * That he could not be convicted of stealing hens, when the charge was of stealing chickens, and that it was not proved that the chickens were Cochin China, but Buff Cochin chickens. * * *

The district judge has well answered all the objections urged by the defendant. He says: "The description of the stolen property is two Cochin China chickens, of the value of," etc.

In 2 Bishop's Cr. Pr. § 700, it is held that such description of the thing stolen as the following is good and sufficient, viz.: "One sheep," "a horse," "a certain mare," "one cow," "one watch," "one certain hog." In State v. Carter, 33 La. Ann. 1214, where the description was "one hog," it was held to be good, and a number of authorities cited in support. See, also, State v. Everage, 33 La. Ann. 122; State v. King, 31 La. Ann. 179.

In State v. Thomas, 30 La. Ann. 600, the property was described as "one small hog." It was urged that indictment was insufficient, in not describing the animal by any mark, or by its color and sex. So, in the case at bar, it was urged that the color, condition and sex of the chickens ought to have been alleged. But if the description, such as "one hog," is sufficient, without mention of the color, sex, condition, flesh marks, or ear marks, as was held in State v. Carter, 33 La. Ann. 1214, what reason exists for a more particular description when chickens are the subject of larceny? Chickens are designated according to sex and age, as chicks, pullets, cockrills, hens and roosters. Hogs are also known as pigs, shoats, barrows, sows and boars. If an indictment charging the larceny of "one hog," or of "one small hog," is sustained by proof that the property stolen was either a boar, a barrow, a sow, certainly an indictment charging the larceny of a chicken is good, and evidence is admissible, whether the chickens stolen were hens, roosters or pullets.

The state is bound to allege and prove every fact or ingredient necessary to constitute the crime charged. The converse must be equally true. If it is unnecessary to aver the color, marks or sex of a hog or chicken charged to have been stolen, then it is unnecessary to prove either of those facts. * * *

Judgment affirmed.[38]

[37] Part of this case is omitted.

[38] See, also, State v. Stelly, 48 La. Ann. 1478, 21 South. 89 (1896).

In Rex v. Douglass, 1 Camp. 212 (1808), Lord Ellenborough was of opinion that where a statute enumerated several articles, as baskets and parcels, an indictment under the statute must describe the article by its specific, not its generic, name. This doctrine was followed in Rex v. Loom, 1 Moody, C. C.

PEOPLE v. BOGART.

(Supreme Court of California, 1868. 36 Cal. 245.)

The indictment charged the defendant with having stolen sundry gold coins, lawful money of the United States, of the aggregate value of three hundred and fifty dollars, and averred that the grand jury could not give a more particular description, as they had no means of knowledge. It also charged that the gold coins were the property of "Wells, Fargo & Co.," without giving the names of the firm, or averring that "Wells, Fargo & Co." was a partnership or a corporation. * * *

SANDERSON, J.[39] The general rule undoubtedly is that the stolen property, if money, should be described as so many pieces of current gold or silver coin, specifying the species of coin; but, if the species of coin be unknown to the grand jury, they may so state, in lieu of such specification. In this respect the law does not require greater certainty than the nature of the case affords.[40] * * *

160 (1827), where it was held that an indictment for stealing sheep would not support a conviction for stealing lambs, and in Rex v. Puddifoot, 1 Moody, C. C. 247 (1829), where it was held that on a similar indictment one could not be convicted of stealing a ewe. These cases, and similar cases, seem to be overruled by Reg. v. Spicer, 1 Den. C. C. 82 (1845).

[39] Part of this case is omitted.

[40] Compare Reg. v. Bond, 1 Den. C. C. 517 (1849). In many jurisdictions it is held to be unnecessary to state the species, number, or denominations of the money stolen. Commonwealth v. Stebbins, 8 Gray (Mass.) 492 (1857); State v. Palmer, 20 Wash. 207, 54 Pac. 1121 (1898), by statute.

AVERMENTS OF WORDS AND WRITINGS.—When it is necessary to set forth an instrument, or writing, as in case of forgery or threatening letters, it may be prefaced by the words "to the tenor following," or "in these words," or "as follows," or "in the words and figures following," for though the setting forth of the instrument by the tenor which imports an accurate copy has been considered to be most technical, yet it has been holden that "as follows" is equivalent to the words "according to the tenor following," or "in the words and figures following," and that if, under such an allegation, the prosecutor fail in proving the instrument verbatim, as laid, the variance will be fatal, and unless the indictment, by these or similar expressions, profess to set out a copy of the instrument in words and figures, it will be invalid. It would be improper to state in these cases, or in an indictment for libel, that the writing was "to the effect following," or "to the substance following." There is no judicial decision that, in an indictment for forgery, the purport and the tenor should both be stated. Purport means the substance of an instrument as it appears on the face of it to every eye that reads it; tenor means an exact copy of it. The words "in manner and form following, that is to say," do not profess to give more than the substance, and are proper in an indictment for perjury; but the word "aforesaid" binds the party to an exact recital. In forgery the indictment may run, that the prisoner forged a paper writing, stating what it was, to the tenor and effect following, etc. An exact copy of the instrument, in words and figures, must then be set forth, to enable the court to see that it is one of those instruments the false making of which the law considers as forgery, and if the instrument be in a foreign language, it must be translated; and the same rule applies to indictments for threatening letters. But in setting forth even the tenor of an instrument a mere variance of a letter will not vitiate, provided the meaning be not altered by changing the word misspelt into an-

In another respect, however, the indictment is bad. The ownership of the money is laid in "Wells, Fargo & Co.," without any specification of the copartners, if it is a partnership, or any allegation that "Wells, Fargo & Co." is a corporation, if such is the case. At common law, if the stolen goods are the property of partners, or joint owners, the names of all the partners, or joint owners, must be stated. Commonwealth v. Trimmer, 1 Mass. 476; Hogg v. State, 3 Blackf. (Ind.) 326; State v. Owens, 10 Rich. Law (S. C.) 169. To avoid this difficulty, the statute of 7 Geo. IV, c. 64, § 14, was passed, which provided that where the stolen goods were the property of partners, joint tenants, parceners, or tenants in common, it should be sufficient to charge the property in one of them by name, and another or others, according to the fact; but we have no such statute in this state. Hence, if "Wells, Fargo & Co." is the name or style of a firm or copartnership, the names of the several persons who compose the firm should have been stated. If, however, "Wells, Fargo & Co." is the name of a corporation, the indictment would have been good, had it contained an allegation to that effect. 2 Russ. on Crimes, 99; People v. Schwartz, 32 Cal. 160. * * *

Judgment reversed, and cause remanded for further proceedings, and remittitur directed to issue forthwith.

other of a different meaning. * * * When the purport may be adopted, instead of tenor, it is not necessary to state the matter with such verbal accuracy, as the former term merely signifies substance, while the latter imports an exact copy. But if the paper forged does not on the face of it appear to be that which the indictment states it purports to be, the proceedings will be invalid. In stating a libel or perjury it is necessary only to set forth so much of the matter as renders the offence complete; provided that the part omitted does not in any way alter the sense of that which is set out. In stating a libel, with the omission of a reference, from which on reading the libel it appeared to be a quotation, the variance was held fatal. In stating a libel or perjury, where different parts of the written instrument, not following each other, are set forth in the same count, they should not be professedly stated continuously, and as immediately following each other; for if they be so stated, and a part should not be proved, the whole count will fail. The proper course is to allege that "in one part of which affidavit or libel there were and are the words following," etc., and in another part thereof the words following, etc. * * * 1 Chitty, Cr. Law, 233.

The statute of 23 Geo. II, c. 11, made it unnecessary in indictments for perjury to set out the false statement according to its tenor. See Bradlaugh v. Reg., 3 Q. B. D. 617 (1887). Similar statutes have been enacted in the United States. U. S. v. Walsh (C. C.) 22 Fed. 644 (1884); State v. Groves, 44 N. C. 402 (1853). A common statute in the United States likewise abolishes the common-law rule requiring, in indictments for forgery, that the writing be set out verbatim. State v. Childers, 32 Or. 119, 49 Pac. 801 (1897); Bostick v. State, 34 Ala. 266 (1859); State v. Pullens, 81 Mo. 387 (1884).

V. Averment of the Degree of Defendant's Connection with the Offense

BANSON v. OSSLEY.

(Court of King's Bench, 1686–87. 3 Mod. 121.)

An appeal of murder was tried in Cambridgeshire against three persons, and the count was, that Ossley assaulted the husband of the appellant and wounded him, in Huntingdonshire, of which wound he languished and died in Cambridgeshire, and that Lippon and Martin were assisting.

The jury found a special verdict, in which the fact appeared to be, that Lippon gave the wound, and that Martin and Ossley were assisting.

The first exception to this verdict was: That the count and the matter therein alleged must be certain, and so likewise must the verdict, otherwise no judgment can be given; but here the verdict finding that another person gave the stroke, and not that person against whom the appellant had declared, it is directly against her own showing.[41] * * *

The Court answered to the first exception, that it was of no force, and that the same objection may be made to an indictment, where in an indictment if one gives the stroke and another is abetting, they are both principally and equally guilty; and an indictment ought to be as certain as a count in an appeal. * * *

HATCHETT v. COMMONWEALTH.

(Court of Appeals of Virginia, 1882. 75 Va. 925.)

Anderson, J., delivered the opinion of the court.[41]

The prisoner, Littleton Hatchett, was indicted jointly with Oliver Hatchett and Henry Carroll; Oliver Hatchett for the willful and malicious murder of Moses Young by poison, Henry Carroll and Littleton Hatchett, the prisoner, as accessories before the fact. It is stated in the petition that Carroll has been tried and acquitted. Oliver, who is charged as principal, had not been tried, but was still under arrest.

The court is of opinion that the evidence is insufficient to connect Oliver Hatchett, who is charged as principal with the perpetration of this crime, to warrant the conviction of the prisoner as an accessory before the fact.

At common law the accessory could not be tried until the principal had been convicted by the verdict of a jury (or outlawed), and the

[41] Part of this case is omitted.

only evidence which was admissible to prove the principal's guilt, was the record of his conviction by the verdict of a jury in a court of competent jurisdiction. In England, and some of the American states, the common-law rule has been subverted by statute, which provides that an accessory before the fact to a felony "may be indicted, tried, convicted and punished, in all respects as if he were a principal felon." Our statute does not go so far. It provides (Acts of Assembly 1877, p. 312, c. 10, § 7) that "in the case of every felon, every principal in the second degree, and every accessory before the fact, shall be punished as if he were the principal in the first degree"; and by section 9, an accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, convicted and punished, and an accessory before the fact may be indicted either with the principal or separately. These provisions are the same in the Code. It does not provide, as the Pennsylvania statute does, which is substantially a copy of the English statute, that he is to be indicted, tried and convicted in all respects as if he were the principal in the first degree.

It is implied by the Virginia statute that he must be indicted, tried and convicted as an accessory before the fact, though he shall be punished as if he were the principal in the first degree. He may be indicted, convicted and punished, whether accessory before or after the fact, by express terms of the statute; but it is as accessory, whether the principal felon has been convicted or not, and the accessory before the fact may be indicted either with the principal or separately, of course, as accessory. He could only be indicted under this statute as accessory. It gives no authority to indict him as principal. Accordingly in Thornton's Case, 24 Grat. 669, 670, it was held by this court that "our statute has not gone far enough to make an accessory before the fact to a felony liable to be convicted on an indictment against him as principal." Upon this view of the statute the conclusion is obvious that an accessory to a felony cannot be prosecuted for a substantive offense, but only as an accessory to the crime perpetrated by the principal felon, and in order to his conviction, although it is not necessary now to show that the principal felon has been convicted, it is necessary to show that the substantive offense, to which he is charged as having been accessory, has been committed by the principal felon.

The court is of opinion that the evidence is clearly insufficient to convict Oliver Hatchett, as principal, with administering the poison. * * *

The court is of opinion that the evidence is plainly insufficient to convict Oliver Hatchett, who is indicted as principal with the killing, or to show that he was guilty of administering the poison. * * *

Judgment reversed.[42]

[42] By statute in England (11 & 12 Vict. c. 46), and in many of our states, the distinction between principals and accessories has been abolished. Some of

REX v. THOMPSON.

(Court of King's Bench, 1676. 2 Lev. 208.)

Error on a judgment on an indictment alleging that the defendant knowingly received and harbored divers thieves to the jury unknown, that had stolen divers goods, and committed divers burglaries. Exception. 1. That this is too general, and not more than alleging that one is a common receiver of felons; and cited Co. 3 Inst. 12, 13, indictment for using divers diabolical arts, Rolls, Indictment, 79, common oppressor of the neighborhood. These are bad, but common barretor is good because that term is well known. 2. Scienter recepit, is not good, but it ought to be that he knowing them to be thieves, received them, for he could know the persons and not know that they were thieves. 1 Cro. Bolton v. Banks, & Ibid. Kirmion v. Wells. 3. It ought to be that he feloniously received felonice recepit, for receipt of felons and harboring them knowing it is felony.

But it was not allowed, for, by the count 1, perchance the felons could be particularly known no more than the felonies and burglaries. And a house that harbors felons is a common nuisance as is a common bawdy house. And as to 2, Jones said that scienter had been lately ruled good in one Sallie's Case. And as to 3, the king may if he please waive the felony and indict for trespass. Upon which the judgment was affirmed.[43]

SECTION 2.—JOINDER OF DEFENDANTS

ANONYMOUS.

(Upper Bench, 1649. Style, 157.)

The court was moved to quash divers Endictments against the Inhabitants of the Parishes of Shoreditch and Hackney in Middlesex, for not repairing the High ways. The exception taken was, that the

these statutes specifically provide that the accessory may be indicted as a principal. See Campbell v. Commonwealth, 84 Pa. 187 (1877); People v. Davidson, 5 Cal. 133 (1855).

[43] "It devolves on the commonwealth to show the guilt of the principal felon before a conviction of the accessory can be had; therefore it is necessary that an indictment against an accessory shall contain such allegation as to the commission of the crime and the guilt of the principal as would make it a good indictment against the principal; and these statements are indispensable to the validity of an indictment, whether joint or several." Pryor, J., in Tully v. Commonwealth, 11 Bush (Ky.) 158 (1874).

"It is in no case necessary to set forth the means by which the accessory before the fact incited the principal to commit the felony, or the accessory after received, concealed or comforted him." Fogler, J., in State v. Neddo, 92 Me. 77, 42 Atl. 255 (1898).

Parishes are jointly endicted, whereas their offences are several, and also not equal, and yet both fined alike. THE COURT quashed the Endictment, and discharged the issues which were not retorned, but not those that were retorned.

REX v. PHILIPS.

(Court of King's Bench, 1731. 2 Strange, 921.)

Six persons were indicted in one indictment for perjury, and four of them pleading were convicted. It was then moved, in arrest of judgment, that crimes (especially perjury) were in their nature several, and two cannot be indicted together. And Palm. 535. 6 Mod. 210. 2 Roll. Abr. 81, pl. 6, 7. Salk. 382. Pas. 11 Geo. I. Rex v. Weston et al., ante 623. Trin. 4 Geo. II. Rex. v. Clendon, ante 870. 1 Keb. 585, 612, 635, were cited.

E contra were cited Salk. 382, in extortion, Trin. 10 Anne, Regina v. Marshal, against two for receiving stolen goods. 1 Ven. 302. 3 Keb. 700, for maintenance. 2 Roll. Rep. 345. Palm. 367. Salk. 384, against husband and wife for keeping a disorderly house, and Regina v. Dixon et ux. Sti. 312. Cro. El. 230. 3 Leon. 230, where this exception was not taken in perjury. Cro. Car. 380.

Sed PER CURIAM. There may be great inconveniences if this is allowed; one may be desirous to have a certiorari, and the other not; the jury on the trial of all may apply evidence to all, that is but evidence against one. The cases cited are all of that which may be joint, as extortion, maintenance, &c. but perjury is a separate act in each: and Trin. 6 Ann. Regina v. Hodson et al., two were indicted for being scolds, and compared to barretry, and held not to lie. The judgment was arrested. Strange pro def.[44]

CUSTODES v. TAWNY AND NORWOOD.

(Upper Bench, 1651. Style, 312.)

Tawny and Norwood were jointly endicted for blasphemous words severally spoken by them, upon the late statute made against blasphemy, and were convicted, the parties being removed hither by habeas corpus. It was urged that the endictment was not good, because it was joint, whereas the words being spoken by them severally, they ought to have been endicted severally; for the words spoken by one of them cannot be said to be the words of the other. But ROLL, Chief Justice, said: The endictment was good enough though it be joint, as it is in

[44] Accord: Uttering profane language. State v. Lancaster, 36 Ark. 55 (1880). Public drunkenness. State v. Deaton, 92 N. C. 788 (1885).

the case of several perjuries, and several batteries, where a joint endictment doth lie, although it do not for several felonies, and here the endictment is upon one and the same statute, and for one and the same offence, and therefore the judgment given upon it is also good, and it shall be taken reddendo singula singulis (i. e.) the words to each of them as they spoke them.[45]

REX v. SUDBURY.

(Court of King's Bench, 1699. 12 Mod. 262.)

The defendants were indicted, for that they riotose et routose assemblaverunt, and so assembled committed a battery on Mary Russell. Two of them were found guilty, and all the others were acquitted; and judgment was arrested, for two cannot commit a riot.

But by HOLT, Chief Justice. If the indictment had been, that the defendants, with divers other disturbers of the peace, had committed this riot, and the verdict had been, in this case the king might have judgment.[46]

SECTION 3.—JOINDER OF OFFENSES

It is frequently advisable, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher and more criminal part of the charge, or the charge precisely as laid, to insert two or more counts in the indictment. * * * Every separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses, that the joinder of counts is admitted. 3 T. R. 106, 107. And to the supposed second or third offense in each count should be prefixed a statement that the jury super sacramentum suum ulterius præsentant. Holt, 687; 4 St. Tr. 686; 6 St. Tr. App. 56; 2 Salk. 632. Nor will the defect of some of the counts affect the validity of the remainder, for judgment may be given against the defendant upon those which are valid.

Chitty, Criminal Law, 248.

[45] Accord: Singing libelous songs. Rex v. Benfield, 2 Burr. 980 (1760). False pretense. Young v. Rex, 3 T. R. 98 (1789). Disturbance of worship. Ball v. State, 67 Miss. 358, 7 South. 353 (1889).

[46] See, also, State v Fox, 15 Vt. 22 (1843); State v. Davis, 2 Sneed (Tenn.) 273 (1854).

YOUNG v. REX.

(Court of King's Bench, 1789. 3 Term R. 98.)

An indictment was preferred at the sessions at Bristol against the defendants on the 30 Geo. II, c. 24, for obtaining money by false pretenses. * * * The defendants were found guilty, and sentenced to be transported for seven years. * * *

Fielding made five objections to the indictment.[47] * * *

The fourth objection was, that the second count in the indictment states a distinct offense, not arising out of, or connected with, the charge in the first count. The charge in the first count was that the bet was made with a colonel at Bath; in the second, that it was with Osmer, another of the defendants. This therefore should have been the subject of another indictment. It is not like the ordinary case of an indictment consisting of several counts, where they are only modifications of the same offense; for here is no mark of the entirety of the offense. These offenses are distinct in their nature, and lead to distinct punishments. But if a prisoner be indicted for two separate offenses, he may be confounded in his defense, and the minds of the jury distracted. In R. v. Roberts, Carth. 226, which was an information against the defendant, who was a ferryman, for receiving divers sums of money from different passengers, after a verdict of guilty, the judgment was arrested; and Holt, C. J., said: "In every such information, a single offense ought to be laid; they ought not to be accumulated under a general charge, because each offense requires a separate punishment." This count, then, charging a distinct offense, cannot be united with the first; neither can it be rejected as surplusage; but it vitiates the whole indictment. * * *

BULLER, J. * * * As to the remaining objection, that is founded on a point which once embarrassed me a great deal. Some years have elapsed since I looked into it, but I believe I can state pretty accurately how it stands. In misdemeanors, the case in Burrows shows that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but even in such cases it is no objection in this stage of the prosecution. On the face of an indictment every count imports to be for a different offense, and is charged as at different times. And it does not appear on the record whether the offenses are or are not distinct. But if it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offenses, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defense, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offenses, though he might have no reason to do so in the other. But these are only mat-

[47] Part of this case is omitted.

ters of prudence and discretion. If the judge, who tries the prisoner, does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last sessions at the Old Bailey, and hope that, in exercising that discretion, I did not infringe on any rule of law or justice. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were, it would overturn every indictment which contains several counts. So where the evidence affects several prisoners differently, I have as was done by Mr. Justice Yates at Hereford, selected the evidence as applicable to each, and left their cases separately to the jury. And in a case which happened before me on the last Spring assizes at Exeter, where two prisoners were indicted for murder, and evidence given which pressed very hard on one prisoner, but was not admissible against the other, I thought it the soundest way of administering justice to sum up the evidence and take the verdict against each separately. But all these are mere matters of discretion only, which judges exercise in order to give a prisoner a fair trial; for when a verdict is given, they are not the subject of any objection to the record.

Judgment affirmed.[48]

SECTION 4.—AMENDMENTS

ODINGTON v. DARBY.

(Court of King's Bench, 1612. Bulst. 35.)

YELVERTON, Justice.[49] Two years since, two were indicted before me at the assizes for felony, in case of life, and found guilty, and this indictment was in the singular number; and this appearing so unto me, I doubted whether the indictment was good or not, and so for this cause I made stay thereof; this afterwards I moved at the table to the judges, eight or nine of them being present, to have their opinions

[48] In some states statutes forbid the joinder of different offenses in the same indictment. See People v. De Coursey, 61 Cal. 134 (1882); State v. Morris, 45 Ark. 62 (1885).

"The English rule against the joinder of a felony and a misdemeanor in the same indictment has been greatly modified by modern decisions. It would be going too far to say now that it exists in any case, except it is where the offenses are repugnant in their nature and legal incidents, and the trial and judgment so incongruous as to tend to deprive the defendant of some legal advantage. Rex v. Ferguson, 29 Eng. Law & Eq. 536; Burk v. State, 2 Har. & J. (Md.) 426; Harman v. Commonwealth, 12 Serg. & R. 69; State v. Hooker, 17 Vt. 658; State v. Boise, 1 McM. 190; Rex v. Galloway, 1 Moo. C. C. 234; Whart. Am. C. L. § 423." Agnew, J., in Henwood v. Commonwealth, 52 Pa. 424 (1866). See, further, post, c. 15.

[49] Part of this case is omitted.

herein, and by all of them clearly the indictment was good, this notwithstanding, and well amendable, and so the same was accordingly amended, and the parties afterwards were hanged for the felony.

ANONYMOUS.

(Upper Bench, 1654. Style, 433.)

Darcy moved that an endictment of Michaelmas term last might be amended in the caption. But ROLL, Chief Justice, answered: It cannot be if it be of the last term, but had it been an endictment of this term it might have been amended.

ANONYMOUS.

(Upper Bench, 1651. Style, 321.)

Letchmore moved the court that the word publicæ might be put into an indictment which was removed hither by certiorari. But THE COURT answered it could not be; but because the indictment was of another term, the clerk of the peace was fined at £10. for his carelessness, and grosse oversight.[50]

[50] Accord: As to material allegations. State v. McCarthy, 17 R. I. 370, 22 Atl. 282 (1891); State v. Chamberlain, 6 Nev. 257 (1871); People v. Trank, 88 App. Div. 294, 85 N. Y. Supp. 55 (1903). It is held in some states that the court may amend the indictment in matters of form without the consent of the grand jury and without an enabling statute. Hawthorn v. State, 56 Md. 530 (1881). Contra: State v. Squire, 10 N. H. 558 (1840). Statutes in some states permit amendments in certain particulars. State v. Corbett, 12 R. I. 288 (1879); Rosenberger v. Commonwealth, 118 Pa. 77, 11 Atl. 782 (1888); Shiflett v. Commonwealth, 90 Va. 386, 18 S. E. 838 (1894); Commonwealth v. Holley, 3 Gray (Mass.) 458 (1855). See, also, Reynolds v. State, 92 Ala. 44, 9 South. 398 (1890).

"The fundamental question here is 'whether an information may be amended, at common law, at the desire of the crown, after plea pleaded.' * * * Why should it not be amended? * * * There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit. An officer of the crown has the right of framing them originally, and may, with leave, amend, in like manner as any plaintiff may do. If the amendment can give occasion to a new defense, the defendant has leave to charge [change] his plea; if it can make no alteration as to the defense, he don't want it." Lord Mansfield, in Rex v. Wilkes, 4 Burr. 2568, 2569 (1770).

PEOPLE v. RODLEY.

(Supreme Court of California, 1900. 131 Cal. 240, 63 Pac. 351.)

GRAY, C.[61] The defendant was convicted of perjury, and sentenced to imprisonment in the state prison for the term of 12 years. He appeals from the judgment and from an order denying his motion for a new trial. * * *

It appears that the grand jury made a partial report, and presented a true bill against defendant for perjury on December 15, 1899, and the clerk was directed by the court to file the same, and issue a bench warrant thereon for the arrest of defendant; and his bail was fixed at the sum of $5,000. The jury then retired for further deliberation. At 3 o'clock p. m. of the same day the grand jury returned into court, and, after being called, the court stated and the jury responded as follows: "The indictment which was presented this forenoon in the case of The People of the State of California v. J. Ellis Rodley, Defendant, was resubmitted by the court to the grand jury from the district attorney to correct an error that appeared upon the face of the indictment, in this: that it appeared from the indictment presented that the matter before the court at the time that J. Ellis Rodley was sworn was a petition for letters testamentary in the estate of Alfred Fuller, deceased, whereas the fact was, and it is in the knowledge of the court, that the petition called for letters of administration with the will annexed. Q. Have you now, Mr. Foreman, the indictment corrected in that respect? A. Yes. Q. Has it been submitted and voted upon after correction? A. Yes. Q. And it is now returned to this court as the correct indictment? A. Yes."

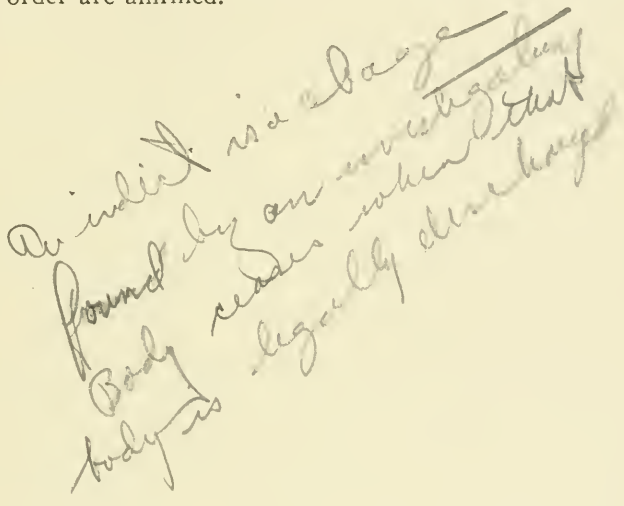
The clerk was thereupon directed to file the indictment, and that the record show that it had been resubmitted. A bench warrant was ordered to issue for the arrest of said J. Ellis Rodley, with bail fixed at $5,000. It was upon the indictment as amended that the defendant was arraigned, pleaded not guilty, and was thereafter tried. He was not arraigned on the indictment prior to its amendment. It appears from the foregoing that there must have been a variance between the indictment as originally presented to the court and the evidence upon which the indictment was found.

There is nothing in the law that will prevent the correction of a mere mistake like this, the result, no doubt, of an inadvertence. The defendant is injured in no way by the correction. "There is no doubt that, with leave of the court, an indictment may be amended by the grand jury at any time before the prisoner has pleaded, and before they are discharged." Thomp. & M. Jur. p. 704; Lawless v. State, 4 Lea (Tenn.) 173; State v. Creight, 1 Brev. (S. C.) 169, 2 Am. Dec.

[61] Part of this case is omitted.

656. In the case of Terrill v. Superior Court, 127 Cal. XVIII, 60 Pac. 38, the question for determination was whether the court, after demurrer sustained to the indictment, could resubmit the case to the same grand jury that had found the first indictment. It was held that this could not be done under the Code provision cited therein; but the judge who delivered the opinion of the court in the course thereof remarked: "Perhaps, before the defendant has been arraigned, the indictment could be withdrawn, and by leave of the court sent back to the jury for amendment." This is what seems to have been done in the present case, and we can see nothing in it prejudicial to any right of defendant, and nothing of which he can be heard to complain. * * *

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.



CHAPTER X

ARRAIGNMENT, PLEAS, AND MOTIONS

SECTION 1.—ARRAIGNMENT AND PLEAS IN GENERAL

When the offender in treason or felony comes into court, or is brought in by process, sometimes of capias, and sometimes of habeas corpus directed to the gaoler of another prison, the first thing that follows thereupon, is his arraignment. * * *

Arraignment, therefore, is nothing else but the calling of the offender to the bar of the court to answer the matter charged upon him by indictment or appeal. * * *

The arraignment of a prisoner, therefore, consists of these parts:

1. The calling the prisoner to the bar by his name, commanding him to hold up his hand, which though it may seem a trifling circumstance, yet it is of importance, for by holding up his hand constat de persona indictati and he owns himself to be of that name.

2. Reading the indictment distinctly to him in English, that he may understand his charge.

3. Demanding of him whether he be guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him cul. prist, and enters the prisoner's plea. Then he demands how he will be tried. The common answer is, "By God and the country," and thereupon the clerk enters po. se, and prays to God to send him a good deliverance.

But if the prisoner hath any matter to plead either in abatement, or in bar of the indictment, as misnomer, auterfoits acquit, auterfoits convict, a pardon, etc., then he pleads it without immediate answering to the felony; but in some cases si trove ne soit, then to the felony not guilty, de quo postea. And thus far what the arraignment is. * * *

A man is said to stand mute when, being arraigned for felony or treason, either (1) he answers not at all, or (2) if he answers with such matter as is not allowable for answer, and will not answer otherwise, or (3) where he pleads not guilty, but when demanded how he will be tried, either will say nothing, or not put himself upon the country.

If he stand mute and say nothing at all, in case of felony the court ought ex officio to impanel a jury and swear it as an inquest of office to inquire, whether he stand mute of malice, and if found so, he shall have the judgment of peine fort et dure, or whether it be ex visi-

tatione Dei,[1] and, if found so, they are to inquire touching all those points, which he might possibly plead for himself, as whether a felony were done, whether he be the same person that is indicted for it, whether he did it, and whether he hath any matter to allege for his discharge.

But what if all this be found against the prisoner, what shall be done? Whether judgment of death shall be given against him, though he never pleaded, seems yet undetermined.[2]

2 Hale, Pleas of the Crown, 216, 316.

FITZHARRIS' CASE.

(Court of King's Bench, 1681. Vent. 354.)

Edward Fitzharris was indicted of High Treason; upon which being arraigned, and demanded to plead, he delivered in a Paper containing a Plea to the Jurisdiction of the Court; which could not be received (as the Court said), not being under Counsel's Hand. Whereupon he prayed to have Counsel assigned, and named divers, whereof the Court assigned four. And he was taken from the Bar, three or four Days being given him to advise with his Counsel, to prepare his Plea as they would stand by him.

The Counsel prayed, that they might have a Copy of the Indictment.

But the Court denied it and said, That it was not permitted in Treason, or any other capital Crimes.

But Justice DOLBEN said, That sometimes it had been allowed to take Notes out of the Indictment. Vid. Mirror, 304. Abusion est que Justices ne monstre l'Indictment a les Indictes s'ils demandront. Section 115.

And note, by St. 7 W. III, c. 3. Persons indicted of Treason where Corruption of Blood is, are to have a copy of their Indictment five Days before their Trial.[3]

HACK v. STATE.

(Supreme Court of Wisconsin, 1910. 141 Wis. 346, 124 N. W. 492.)

WINSLOW, C. J.[4] The plaintiff in error (hereinafter called the defendant) was convicted of selling whisky to a minor of the age of 13 years, and brings his writ of error to reverse the judgment. * * *

[1] For procedure on arraignment of a dumb person, see Thompson's Case, 2 Lewin, C. C. 137 (1827).

[2] It is now generally provided by statute that, on failure to plead, a plea of not guilty shall be entered. Reg. v. Bernard, 1 Fost. & F. 240 (1858); Commonwealth v. Place, 153 Pa. 314, 26 Atl. 620 (1893).

[3] While, on arraignment, indictment should be read in full, yet, if the formal concluding part is omitted, it will not vitiate a sentence pronounced on a plea of guilty. State v. Crane, 121 La. 1039, 46 South. 1009 (1908).

[4] Part of this case is omitted.

By a singular oversight the defendant was not formally arraigned in the circuit court, and never pleaded to the information. An information in due form was filed; the jury was called and sworn; witnesses for both the state and the defendant were examined and cross-examined; the jury was charged by the court, and rendered its verdict, in all respects as though issue had been formally joined. Inasmuch as the information was valid, and the jury duly sworn and charged with the defendant's deliverance, he was put in jeopardy, so that, had he been acquitted, he could not have been again prosecuted. He knew perfectly well the offense with which he was charged, and was allowed to make his defense just as fully and effectively as if a plea of not guilty had been made, and the question now is whether the inadvertent omission of arraignment and plea, which has not in the least affected any substantial right of the defendant, should be held fatal to the judgment.

It is freely conceded that the early Wisconsin decisions answer this question in the affirmative. Anderson v. State, 3 Pin. 367; Douglass v. State, 3 Wis. 820; Davis v. State, 38 Wis. 487. See, also, Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, where the authorities are reviewed, and the doctrine contended for by the defendant fully sustained by a divided court.

It must also be conceded that it is held by the Supreme Court of the United States, in the Crain Case, that arraignment and plea are essential to due process of law, guaranteed to the citizen by the fourteenth amendment. A state could not, therefore, pass a law providing for trial without arraignment or plea; but that does not necessarily affect the question whether a citizen may not effectually waive that right. This court has held that constitutional rights may be waived by the defendant, except, perhaps, in capital cases. Thus an accused person has the absolute constitutional right to a trial by a jury, which means a body of 12 competent jurymen, yet this court held, as early as the case of State v. Vogel, 22 Wis. 471, that by not exercising his right of challenge the defendant waived all objections to the qualifications of jurors, and a verdict of guilty would stand, notwithstanding the fact that one of the jurors was an alien, and the further fact that his alienage was not known to the defendant. * * *

No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights, and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.

Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there

is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error, not affecting the merits, and thus secured a new trial because forsooth he can waive nothing? We think not. We think that sound reason, good sense, and the interests of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned. We believe it has been laid aside in fact (save for the single exception that trial by a jury of 12 cannot be waived unless authorized by a specific law) by the former decisions of this court. It is believed that this court has uniformly attempted to disregard mere formal errors and technical objections, not affecting any substantial right, and to adhere to the spirit of the law which giveth life rather than to the letter which killeth. It may not always have succeeded; it is intensely human, but since the writer has been here he knows that the attempt has been honestly made. * * *

Our conclusion is that the doctrine of Douglass v. State, supra, and the cases following it, should be overruled. The principle now declared is that the right of arraignment and plea will be waived by the defendant by his silence when he ought to demand it, in all cases (except capital cases) where it appears that he is fully informed as to the charge against him, and is not otherwise prejudiced in the trial of the case by the omission of that formality. Other Code states so hold. People v. Osterhout, 34 Hun, 260; People v. Bradner, 107 N. Y. 1, 13 N. E. 87; State v. Cassady, 12 Kan. 550; State v. Straub, 16 Wash. 111, 47 Pac. 227; Hudson v. State, 117 Ga. 704, 45 S. E. 66. * * *

Judgment affirmed.[5]

KERWIN, J., dissents. TIMLIN, J. (dubitante).

We are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either: (1) A plea to the jurisdiction; (2) a demurrer; (3) a plea in abatement; (4) a special plea in bar; or (5) the general issue. * * * Formerly there was another plea, now abrogated, that of sanctuary.[6] * * * Formerly also the benefit of clergy used to be pleaded before trial or conviction, and was called a declinatory plea.[7] * * * A plea to the jurisdiction is where an indictment is taken before a court that hath no cognizance of the of-

[5] See, also, Hast v. Territory, 5 Okl. Cr. 162, 114 Pac. 261 (1911), rape; contra, People v. Heath (Colo.) 117 Pac. 138 (1911); State v. Drown (Vt.) 81 Atl. 641 (1911). By statutory provision in some states arraignment may be waived. See State v. Thompson, 95 Iowa, 464, 64 N. W. 419 (1895); People v. Tower, 63 Hun, 624, 17 N. Y. Supp. 395 (1892); State v. Hoffman, 70 Mo. App. 271 (1897); State v. Brock, 61 S. C. 141, 39 S. E. 359 (1900).

[6] See 2 Pollock & Maitland's Hist. Eng. Law (1st Ed.) 588.

[7] See 1 Pollock & Maitland's Hist. Eng. Law (1st Ed.) 424 et seq.

fense. * * * A demurrer to the indictment. This is incident to criminal cases as well as civil, when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. * * * Some have held (2 Hale, P. C. 257) that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others (2 Hawk. P. C. 334), who hold that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him, which appears the more reasonable.

A plea in abatement is principally for a misnomer, a wrong name, or false addition to the prisoner.

Special pleas in bar, which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: A former acquittal, a former conviction, a former attainder, or a pardon.

4 Black. Com. c. XXVI.

REGINA v. FADERMAN.

(Central Criminal Court, 1850. 3 Car. & K. 353.)

Demurrer. The prisoners were indicted at the Central Criminal Court of the February session, 1850, and Mr. Justice Vaughan Williams stated the following case for the opinion of the Court for Crown Cases Reserved:

"The prisoners were indicted under Stat. 1 Wm. IV, c. 66, § 19, by which it is made a felony to engrave, etc. (without authority), on any plate or on any wood, stone or other material, any bill of exchange, promissory note, undertaking or order for the payment of money or any part of any bill of exchange, etc., of any foreign prince or state, or knowingly to have in possession any plate, etc., so engraved, or to utter or to knowingly have in possession any paper on which any part of such foreign bill, etc., shall be made or printed.

"The counsel for the prisoners demurred to the indictment, and the demurrer having been argued, I gave judgment for the crown. But I reserved the question as to the validity of the indictment (a copy of which will accompany this statement) for the consideration of this court. [Signed] Edw. Vaughan Williams." [8]

ALDERSON, B., now delivered the opinion of the [Central Criminal] Court as to what judgment should be entered up on the demurrer. His Lordship said:

The first question is whether this demurrer can be sustained, and

[8] The Court for Crown Cases Reserved held it had no jurisdiction in a case in which judgment had been given on a demurrer and therefore gave no judgment. The proceedings in that court are here omitted.

it is the unanimous opinion of the court that the demurrer must be overruled, inasmuch as it appears to the court that many of the counts in this indictment are clearly good; and as one good count would be sufficient to authorize a conviction and judgment, the court is clearly of opinion that this demurrer, which goes to the sufficiency of the whole indictment, must be overruled. A more important question remains to be disposed of, which is as to what judgment this court ought to pronounce on the demurrer being overruled. Whether the prisoners are to be allowed to plead over? or whether final judgment should be passed upon them as in the case of a conviction? We have taken time to look into the authorities on the subject, and have taken considerable pains to ascertain what is the right course to be taken in this case, and the result at which we have arrived is that the judgment must be final, inasmuch as by a general demurrer, which this is, the prisoners confess all the material facts charged against them in the indictment. In the case of a demurrer of a special nature, which is usually called a demurrer in abatement, it may be otherwise; and it is very probable that the various dicta which occur in the books in opposition to our present decision may be accounted for by this distinction not having been sufficiently attended to.

Parry, for the prisoner, asked that they might be allowed to withdraw the demurrer, and plead not guilty.

ALDERSON, B. We cannot allow that, and I think that such a proceeding ought not to be encouraged.

On a subsequent day sentence was passed on the prisoners.[9]

[9] Accord: Where the indictment is for a misdemeanor. Wickwise v. State, 19 Conn. 477 (1849); McCuen v. State, 19 Ark. 630 (1858). It is in the discretion of the court, however, to allow the defendant to answer over. Commonwealth v. Gloucester, 110 Mass. 500 (1872); State v. Wilkins, 17 Vt. 151 (1845). It is generally said, in the cases in this country, that, while judgment adverse to defendant on a demurrer to an indictment for a misdemeanor is final, the like judgment on an indictment for felony must be respondeat ouster. State v. Merrill, 37 Me. 329 (1853); Commonwealth v. Foggy, 6 Leigh (Va.) 638 (1836); McCuen v. State, 19 Ark. 630 (1858). In some states, by statute, the right to plead over is secured to the defendant, even in cases of misdemeanor. Thomas v. State, 6 Mo. 457 (1840).

"A plea of nolo contendere, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt only, and cannot be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such a plea, as well as upon a plea of guilty, and such plea, if accepted, cannot be withdrawn, and a plea of not guilty entered, except by leave of court. But there is a difference between the two pleas, in that the defendant cannot plead nolo contendere without the leave of the court. If such plea is tendered, the court may accept or decline it in its discretion." Morton, C. J., in Commonwealth v. Ingersoll, 145 Mass. 381, 14 N. E. 449 (1887).

In some states statutes provide that in capital cases the plea of guilty shall not be received. State v. Genz, 57 N. J. Law, 459, 31 Atl. 1037 (1895).

"By a plea of guilty the defendant confesses himself guilty in manner and form as charged in the indictment; and if the indictment charges no offense against the law, none is confessed." McEnery, J., in State v. Watson, 41 La. Ann. 599, 7 South. 126 (1889).

SECTION 2.—NOLLE PROSEQUI AND MOTION TO QUASH

STATE v. SMITH.

(Supreme Judicial Court of New Hampshire, 1870. 49 N. H. 155, 6 Am. Rep. 480.)

Five indictments were found March term, 1869, against Willard Smith, three of them for selling liquor, one for keeping liquor for sale, and one for being a common seller. At March term, 1869, respondent pleaded "not guilty." At the September term, the solicitor stated that he believed that the respondent had ceased the sale of liquor, and that he had arranged with respondent's counsel that, if the respondent pleaded nolo contendere to all the indictments, the state would at this time move for sentence on only one indictment, reserving the right to bring forward the other indictments and move for sentence if the respondent should, in future, violate the liquor law. Thereupon Peter Sherman moved for leave to appear and prosecute the indictments, alleging that he was the complainant, and entitled to half the fines, and that respondent has not ceased the sale of liquor. Sherman also moved that, if necessary, to entitle him to appear, or to receive half the fine, the indictments might be so amended as to aver that he was the complainant. The solicitor and the respondent both objected.

For the purpose of allowing the questions thus arising to be reserved, it was ruled pro forma, and subject to exception, that Sherman's motions should be granted, if it should hereafter be made to appear, by proper proof, that he was complainant.

Case reserved.

NESMITH, J.[10] No question is made, by the counsel on either side, as to the general discretionary power of the prosecuting officer, in this state, to enter a nolle prosequi in ordinary indictments instituted in the name of the state. This power such officer exercises virtute officii, frequently before a jury is impaneled, and sometimes while the case is on trial before the jury, with the consent of the respondent, and sometimes after a verdict is rendered against the prisoner.

It may be that the prosecuting officer finds his indictment defective in form or substance, and that he may wish to procure a better one, or he may discover that the evidence will not sustain the charge as alleged, and a change may be requisite to conform to the actual proof. There may be various reasons for discontinuing the prosecution, all which he must determine, being controlled by well-settled principles of law and practice, and a sound legal discretion. It is not to be presumed that this officer will voluntarily consent to any discontinuance which will materially injure the rights of the prisoner, or that he will

[10] Part of this case is omitted.

violate knowingly his official trust, or in any way act corruptly or oppressively.

Generally, whether a jury shall be impaneled, or not, depends upon the determination of the prosecuting officer; but, when a jury is organized and the trial commences, the respondent then acquires new rights, which the court will protect. It may be regarded as the respondent's right to have the jury pass upon the facts of his case, because their verdict becomes a bar to another indictment for the same offense, and a nolle prosequi will not thus operate for the prisoner's benefit. Therefore, in this state of the proceedings, the prisoner having a right to insist upon a verdict upon the whole evidence of the case, of course, there can be no discontinuance of the prosecution except upon the prisoner's express consent.[11]

These elementary principles are discussed in Aaron Burr's Trial, seriatim; also in Commonwealth v. Tuck, 20 Pick. 365, and other cases cited by respondent's counsel. In the latter case, Chief Justice Shaw claims the power to the Attorney General, or other prosecuting officer, to enter a nolle prosequi after verdict against the prisoner, and says such a practice has prevailed for many years, and is found highly useful to the due administration of the criminal law. It may be ascertained that the party convicted may still be innocent. It may become important to use him as a witness against more flagrant offenders. The power to enter a nolle prosequi exists in the prosecuting officer. He exerts it upon his official responsibility. The court has no right to interfere in its exercise. They can only judge of the effect of the act, when done, or of the legal consequences which may follow from it. The court will take care that it shall not operate to the prejudice of the respondent's rights. Commonwealth v. F. O. J. Smith, 98 Mass. 10; 1 Chitty's Crim. Law, 479 and 845.

The counsel for the prosecutor, Sherman, claims the right for his client to interfere with the practice of the solicitor in this particular case, and asked for leave of the court to be granted to him to appear and prosecute these indictments. Under a fair construction of sec-

[11] Accord: Commonwealth v. Scott, 121 Mass. 33 (1876). But see State v. Roe, 12 Vt. 93 (1840); Wilson v. Commonwealth, 3 Bush (Ky.) 105 (1867).

"Any part of a count, which is in its nature severable from the rest, may be removed by nolle prosequi, and the remainder stand." Peters, C. J., in State v. Bean, 77 Me. 487 (1885).

"The power of the court to order the representative of the state to enter a nolle prosequi upon an indictment presents a different question. At the common law only the Attorney General could exercise this power, and in doing so was beyond the power or control of the court. 1 Arch. Cr. Plead. (Pomeroy's Notes) 316; People v. McLeod, 1 Hill [N. Y.] 377 [37 Am. Dec. 328]; State v. Graham, 41 N. J. Law, 15 [32 Am. Rep. 174]." Knapp, J., in State v. Hickling, 45 N. J. Law, 154 (1883).

"There seems no good reason why the motion of the attorney for the government (to strike off an entry of nol. pros. from the docket) should not have been granted, and in granting it the court took especial care that the prisoner should not suffer therefrom in his defense." Appleton, J., in State v. Nutting, 39 Me. 362 (1855).

Accord: Parry v. State, 21 Tex. 746 (1858). But see Henry v. Commonwealth, 4 Bush (Ky.) 427 (1868); Kistler v. State, 64 Ind. 371 (1878).

tion 21 of chapter 99 of the General Statutes, we think it was the clear intent of the Legislature to give him, who might volunteer to prosecute for the violations of the law embraced in this chapter, a bounty or a reward equal to one-half the fines that should be collected by means of such prosecutions. As the statute in this case prescribes no new mode of proceeding under it, in order to establish the right of the complainant to recover his bounty, it must be presumed that he must obtain his remedy according to the ordinary rules of practice, as known in our courts. It therefore cannot be presumed that the complainant can come into court, and oppose the predetermined action of the prosecuting officer, or that he can set up his will as superior to the fiat of the officer. Such a practice would introduce confusion into this department of the law. An attempt of the kind indicated by the prosecutor's motion was lately made in the Court of the Queen's Bench, in England, and failed there for the reasons suggested by the justices of that court. Regina v. Allen, 1 Best & Smith, 101 (Eng. C. L. Reports, 854). * * *

Motion denied.

PEOPLE v. DAVIS.

(Court of Appeals of New York, 1874. 56 N. Y. 95.)

GROVER, J.[12] The indictment charged the commission of the crime at the town of Brookfield, in the county of Madison, and within 500 yards of the boundary line between the county of Otsego and the county of Madison. The counsel for the accused moved to quash it because the crime was not charged to have been committed in the county of Otsego. * * *

The counsel for the prisoner also excepted to the denial of his motion to quash the third count, or to compel the prosecutor to elect upon which offense therein charged he would proceed. The denial of this motion was not the proper subject of an exception. The accused has not a legal right to have the sufficiency of an indictment, or of any count therein, determined upon motion to quash or set it aside, or to put the prosecutor to an election, when more than one offense is charged, upon which he will proceed. It is in the discretion of the court whether or not to set aside a defective indictment upon motion; and unless the question is free from doubt, the court ought not to do it, but leave the counsel to his demurrer, or motion in arrest of judgment. * * *

[12] Part of this case is omitted.

STATE v. RIFFE.

(Supreme Court of Appeals of West Virginia, 1877. 10 W. Va. 794.)

MOORE, Judge, delivered the opinion of the court.[13]

An indictment was found in the circuit court of Monroe county against A. L. Riffe for selling spirituous liquors without license. On the 18th October, 1872, the defendant appeared and plead not guilty; and on the 16th October, 1874, defendant again appeared, and moved the court to quash said indictment, which motion was sustained, and the defendant discharged. Thereupon the state petitioned for and obtained from this court a writ of error, and in that way presents the case for the adjudication of this court upon two alleged grounds of error. * * *

It was error to quash the indictment, for the reason that the motion came too late; the defendant having long before plead to the indictment. * * *

As to the question that the motion to quash was made after the plea had been entered: The proper course is to move to quash before pleading, but the court may, at any time before the trial upon the plea, permit the plea to be withdrawn, and enter the motion to quash, at the instance of the defendant.

The judgment of the circuit court should be reversed, with costs to the state against the defendant, and the case remanded to the circuit court, to be proceeded in according to the principles enunciated in this opinion, and further according to law.

Judgment reversed and case remanded.

SECTION 3.—PLEA OF FORMER JEOPARDY

If they [the jurors] declare upon their oaths that they know nothing of the fact, let others be called who do know it, and if he who put himself on the first inquest will not put himself on a new jury, let him be remanded back to penance till he consents thereto.

Britton (Nichol's Trans.) lib. 1, 12 b.

It is a good plea on appeal or indictment of felony to say that he was formerly arraigned for the same felony before such justices, &c.,

[13] The arguments of counsel and parts of the opinion are omitted.

and acquitted, and to vouch the record; for he is not required to have the record in hand, for this plea is not a dilatory plea, but a plea in bar, as appears, tit. Coron. in Fitz. P. 232. M. 20 E. 2. &c., such plea is a good bar, because a man by the common law should not put his life twice in jeopardy of trial for the same felony, except it be in some special case, of which I will speak hereafter. But note that it ought to be the same offense, for otherwise his plea is not to the purpose, and therefore if two men are indicted of felony as principals, and then by another indictment it is found that one committed the felony and the other only feloniously received him after the felony was committed, and upon the first indictment both are arraigned and acquitted, and then he who is indicted as accessory is arraigned, and he pleads that he was formerly acquitted as above, this plea should not discharge him, because it is not the same offense, but a different one, for it is done on different days, which see titulo Corone in Fitz. P. 200; anno 27 lib. ass. P. 10, and H. 8. H. 5. P. 493. But if he was indicted as an accessory before the offense committed, this acquittal of him as a principal should discharge him of this offense also, for it is in manner one offense although it is done on several days, for when the felony is committed by force of command or abetment the one who commands in such case is a party to the principal felony. But it is otherwise with the accessory after the felony committed, and with this agrees Bracton.

Staunford, P. C. lib. 2, c. 36, p. 105.

If a man be acquitted on an appeal or upon the indictment, although there be error in the process, the acquittal is good. But it is different where the appeal or the indictment was not sufficient, etc.

Fitz. Corone, fol. 259, pl. 444.

HUTCHINSON'S CASE.

(Court of King's Bench, 1677. 1 Leach, C. C. 135, note.)

Mr. Hutchinson, who had killed Mr. Colson in Portugal, was acquitted there of the murder; and being afterwards apprehended in England for the same fact, and committed to Newgate, he was brought into the Court of King's Bench by habeas corpus, where he produced an exemplification of the record of his acquittal in Portugal; but the king being very willing to have him tried here for the same offense, it was referred to the consideration of the judges, who all agreed that, as he had been already acquitted of the charge by the law of Portugal, he could not be tried again for it in England.[14]

[14] But an acquittal by a court-martial is no bar to a subsequent prosecution before a court of law. In re Fair (C. C.) 100 Fed. 149 (1900). So an act may offend against the law of more than one jurisdiction, in which case a con-

JONES AND BEVER'S CASE.

(Court of King's Bench, 1665. Kelyng, 52.)

At the Gaol-delivery in the Old Baily, 19 February, 1665, John Jones and Philip Bever, were indicted for Burglary for breaking the King's House at Whitehall, and stealing from thence the Goods of the Lord Cornbury, and were found not Guilty. And after were indicted for the same Burglary, and stealing the Goods of Mr. Nunnesy. And we agreed that they being once acquitted for the Burglary, could not be indicted again for the same Burglary, but might be indicted for stealing the Goods of Mr. Nunnesy according as it was formerly resolved in Turner's Case. Vide Kelyng, 30. . But in this case when we saw the Evidence not sufficient to prove the stealing of my Lord Cornbury's Goods, we might have discharged the jury and so taken no Verdict;[15] and then he might have been indicted for that Burglary, and stealing the Goods of Mr. Nunnesy.

REX v. JANE D———.

(Court of King's Bench, 1670. Vent. 69.)

She was indicted for stealing of several things, and pleaded not guilty, and a jury sworn to try her; the witnesses, not appearing, were suspected to be tampered with by the prisoner; and the jury were discharged, and the trial put off.[16] Vide 1 Inst. 227, b, contra.

viction or acquittal in one jurisdiction is no bar to a prosecution in the other. State v. Norman, 16 Utah, 457, 52 Pac. 986 (1898); State v. Reid, 115 N. C. 741, 20 S. E. 468 (1894). Compare People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751 (1889). The constitutional provision against double jeopardy does not apply to a contempt proceeding. Jones v. Mould, 151 Iowa, 599, 132 N. W. 45 (1911).

15 "By the ancient law if the jury sworn had been particularly charged with a prisoner, as before is showed, it was commonly held * * * they could not be discharged before their verdict given up. * * * But nothing is more ordinary than after the jury sworn, and charged with a prisoner, and evidence given, yet if it appear to the court that some of the evidence is kept back, or taken off, or that there may be a fuller discovery, and the offense notorious, as murder or burglary, and that the evidence, though not sufficient to convict the prisoner, yet gives the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner." 2 Hale, P. C. 295.

"Nor is it now a question, nor, I hope, will it ever be a question again, whether in a capital case the court may, in their discretion, discharge a jury after evidence given and concluded on the part of the crown, merely for want of sufficient evidence to convict, and in order to bring the prisoner to a second trial." Foster, J., in Kinloch's Case, Foster, C. L. 30 (1746). See, also, Reynolds v. State, 3 Ga. 53 (1847). Compare People v. Ny Sam Chung, 94 Cal. 304, 29 Pac. 642, 28 Am. St. Rep. 129 (1892); State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238 (1896); Pizano v. State, 20 Tex. App. 139, 54 Am. Rep. 511 (1886).

16 Accord: Where juror fraudulently procures himself to be impaneled.

ANONYMOUS.

(Assizes, 1351. Lib. Ass. 122, pl. 16.)

An indictment for the death of W. White at N. and he alleges a record by which it appeared formerly he was acquitted of the death of W. D. at E. and said that this was the same person, and now offers the record, &c. And other witnesses say that it was the same person. Wherefore it was adjudged that he be acquit, &c.[17]

STATE v. BENHAM.

(Supreme Court of Errors of Connecticut, 1829. 7 Conn. 414.)

WILLIAMS, J.[18] The statute, upon which this information is founded, enacts: "That if any person shall have in possession, or receive from any other person, any forged or counterfeited promissory note or bill, for the payment of money, with intention to utter or pass the same, or to permit, cause or procure the same to be uttered or passed, with intention to defraud any person, or body politic or corporate, knowing the same to be forged or counterfeited; every such person, so offending, being thereof duly convicted, shall suffer imprisonment," etc. St. 157, tit. 22, § 35. The prisoner had in his possession, at one time, several bank notes or bills of different banks, which were taken from him at one time. He has been tried for having one of them in his possession, and convicted; and the question now is, whether he can be again tried and convicted for possessing each of the other notes of the different banks, which he had at that time. In other words, is

State v. Washington, 89 N. C. 535, 45 Am. Rep. 700 (1883). Where a juror becomes too ill during the trial to attend. Gardes v. U. S., 87 Fed. 172, 30 C. C. A. 596 (1898). Where the jury is discharged with consent of defendant. State v. Allen, 46 Conn. 531 (1879). Where defendant himself has made it impossible for a valid verdict to be rendered, or a valid judgment entered against him. People v. Higgins, 59 Cal. 357 (1881). See, also, Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968 (1891).

When defendant obtains a new trial after a conviction of manslaughter, or of murder in some degree less than that of which he might have been convicted on an indictment for murder, the authorities are in conflict on the question whether the conviction of manslaughter was an acquittal of the murder, so as to bar a subsequent indictment for murder on the same facts. See, for the affirmative, People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245 (1903); Rolls v. State, 52 Miss. 391 (1876); State v. Belden, 33 Wis. 120, 14 Am. Rep. 748 (1873). Contra: Reg. v. Tancock, 13 Cox C. C. 217 (1876); Waller v. State, 104 Ga. 505, 30 S. E. 835 (1898); State v. Bradley, 67 Vt. 465, 32 Atl. 238 (1894); State v. Behimer, 20 Ohio St. 572 (1870).

[17] "If the prisoner be now arraigned of a felony by the name of A. B. (by which name, as also by the name of A. C., he is well enough known), then may he say that he was before time acquitted of the same felonie, before such or such justice, by the name of A. B., averring that he is the same person and that he is known by the one and the other calling. Lib. Ass. 26, pl. 15 & 11 H. 4, 93." Lamb. Eirenar. 555.

[18] The statement and the arguments of counsel are omitted.

the possession of each bill or note, holden at one and at the same time, a distinct offense, and punishable as a distinct crime?

Until the late revision of our statutes, it was not punishable by statute to have in one's possession forged notes or counterfeited coin. The offense consisted in uttering or putting them off. Now the possession is punishable in the same manner as the offense of uttering them is. But it cannot be supposed that the Legislature intended to punish the offense of possessing such bills or notes, or coin, more severely than the crime of putting them off; or that they should punish the man, who barely intended to defraud, but had not yet offered to, more severely than the one who had put that intent into execution. And if Benham had put off these two notes to one person, at one time, it cannot be claimed that he could be convicted of more than one offense. And yet it is claimed that having them in his possession, although he has never offered to put them off, he may be punished for more than one offense.

In support of this it is said that the notes are issued by different banks, and the intent charged is to defraud the two different banks specified, viz., the Troy Bank and the Mechanics' Bank, as well as the persons to whom the notes might be put off. If a charge of defrauding the several banks constitutes two distinct offenses, then the offense of uttering these two notes to the same person, at the same time, would be two offenses; because the intent might properly be charged as an intent to defraud each of the banks, as well as the persons to whom they were put off.

But, as in that case, the putting off a note, with intent to defraud the persons to whom it was put off, would be sufficient to convict, whether there was any attempt to defraud the bank or not, as was recently decided in England, by the twelve judges; so in this case, as it is charged in both informations that the intention was to defraud the persons to whom the notes might be put off, that would be sufficient to justify the conviction; and all that is necessary to constitute the identity of the offense is that the same evidence would convict. Here the same evidence of possession exists in both cases; the same general attempt to defraud the persons to whom they may be passed. The act of possessing the several notes, then, must be one and the same offense, as much as the act of stealing a number of articles, at the same time and place.

It was admitted in argument that he who had counterfeit coins in his possession could not, under the thirty-second section, be punished, as for distinct offenses, for each piece of counterfeit coin he might have. The offense is, certainly, of the same character with this; and it is difficult to believe that the Legislature intended to punish them in so different a manner. It is true that in that section the statute speaks of gold and silver coins; but it will hardly be contended that if a person has a single counterfeit eagle in his possession, with intent to pass it knowing that it is counterfeit, he is not within the stat-

ute. The difference in phraseology, therefore, it is believed, will make no difference in the construction. The object of the Legislature, in both cases, is to prevent a person from altering or having in his possession base money. And it has been decided that a person indicted for stealing nine one pound notes, may be convicted upon proof of stealing only one. Rex v. Johnson, 3 Mau. & Selw. 539, 548; Rex v. Clark, 1 Brod. & Bing. 473. There the substance of the offense is stealing notes; here the substance of the offense is having in possession counterfeit bills or notes. The number may add to the evidence of guilt, but not to the number of the offenses. In an action for the penalty for insuring tickets in the lottery, where ten tickets were insured at one and the same time, Lord Kenyon held that but one penalty could be recovered. Holland q. t. v. Duffin, Peake's Ca. 58.

This information might have specified each note which the prisoner had in his possession, as was done in several cases cited in King v. Sutton, Ca. tem. Hardw. 372. Had that been done, it would hardly be claimed that there could have been several punishments. The offense, then, is one and the same offense.

Another objection was made to the plea, but not much insisted on, that, if this is the same offense, it is not pleaded so as to avail the defendant. The plea is that a verdict was rendered, and judgment now impends. And here it must be admitted that a previous acquittal, conviction, or attainder is a good bar; but what shall be the evidence of such conviction is the inquiry.

That a person had been arraigned for the same offense was early held to be no bar to a subsequent indictment. Withipole's Case, Cro. Car. 147. Nor that a nolle prosequi had been entered by the attorney for the government. Commonwealth v. Wheeler et al., 2 Mass. 172.[19] Nor that the jury had been discharged, at the request of the prisoner. Rex v. Kinlock, 1 Wils. 157. Nor even where the jury have been discharged because they could not agree, without consent of the prisoner. State v. Woodruff, 2 Day, 504, 2 Am. Dec. 122; People v. Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168.[20] Nor can the pendency of another indictment be pleaded in abatement, as it may in a case of a prosecution for a penalty. Rex v. Stratton, Doug. 240; Regina v. Goddard et al., 2 Ld. Raym. 930, s. c. 3 Salk. 171. Nor can a conviction or an acquittal be pleaded, if the former indictment was

[19] Contra: Where the nolle prosequi has been entered after the jury has been impaneled. Reynolds v. State, 3 Ga. 53 (1847); U. S. v. Farring, 4 Cranch, C. C. 465, Fed. Cas. No. 15,075 (1834). Unless the nolle prosequi was entered because the indictment was insufficient to warrant a conviction. Walton v. State, 3 Sneed (Tenn.) 687 (1856). Or because of a material variance. Martha v. State, 26 Ala. 72 (1855).

"There is, in point of law, a difference between the plea of autrefois convict, and autrefois attaint of the same offense. The former may be where there has been no judgment; the latter is founded upon a judgment." Story, J., in U. S. v. Gilbert, 2 Sumn. 40, Fed. Cas. No. 15,204 (1834).

[20] But where the jury was discharged without the consent of the prisoner and before they had declared themselves unable to agree, the prisoner was held to have been in jeopardy. People v. Warden, 202 N. Y. 138, 95 N. E. 729 (1911).

not sufficient to authorize punishment, if a conviction had ensued. King v. Taylor, 3 B. & C. 502; 4 Co. 45; 1 Chitt. Cr. L. 462. And it has been said that if the defendant remains after conviction, without requesting judgment, or praying for clergy, he could not plead such conviction to a new indictment. 2 Hale's P. C. 252; Stark. C. L. 364.

That no one, however, shall be put in jeopardy twice for the same offense, is a universal maxim (4 Bla. Comm. 329), thought worthy to be incorporated, to a certain extent, into the Constitution of the United States. And that an acquittal or conviction, by a court having jurisdiction, on a sufficient indictment or information, is in all cases whatsoever a bar, is equally clear. 2 Hawk. P. C. bk. 2, c. 30, § 1; 2 Leon. 161. Still the question returns, what is sufficient evidence? Is it the verdict, or the verdict and judgment? It is said by Chitty that there must be a legal acquittal by judgment upon trial, by verdict of a petty jury, or by battle. 1 Chitt. C. L. 457. Tucker, in his notes to Blackstone, says the plea must state the indictment, arraignment, plea, and judgment legitimo modo. 4 Bla. Comm. 336, by Tucker. And in the forms of pleading a judgment is set out, or that the defendant has had his clergy. Stark. C. L. 352. And the general rule certainly is that a verdict without a judgment is not evidence, as it may be arrested The record of the judgment, therefore, must be adduced, to exclude a witness. Swift's Ev. 18; 1 Stark. Ev. 183, 246; 2 Stark. Ev. 716; Lee v. Gansel, Cowp. 3; Commonwealth v. Green, 17 Mass. 537. So proof of conviction of the principal, on the trial of the accessory, must be by judgment upon a verdict or confession, or by outlawry. 4 Co. 43; Goff v. Byby et al., Cro. Eliz. 540.

On the other hand, it is said, in 4 Bla. Comm. 335, that when one is found not guilty, on an indictment or other prosecution, he may plead such acquittal in bar of any subsequent prosecution. And an acquittal has been held sufficient to entitle bail to their discharge before judgment is entered. Rex v. Spenser, 1 Wils. 315. And in the case of Queen v. Goddard, 2 Ld. Raym. 921, s. c. 3 Salk. 172, Holt, C. J., says that another indictment pending could not be pleaded in abatement, even after the accused had been found guilty upon it, but it must be pleaded in bar. And Judge Dane, after citing an authority to show that a judgment is necessary, makes a quære; for, says he, when the defendant has once stood trial for his life, he has been clearly once in jeopardy, though there has been no judgment or clergy. 6 Dane's Abr. 531. And in Brooke's Case, 4 Co. 40, after verdict of guilty, on an appeal and motion in arrest, on an indictment at the suit of the king, it was claimed that the defendant could not be charged again, and it was resolved that, "if the count had been sufficient, then being convicted at the suit of the party, he should not be again convicted at the suit of the king; and the same principle is recognized, in Vaux's Case, 4 Co. 45. 1 Chitt. C. L. 462, 464, et seq. Had not a verdict been sufficient, it is not easy to see how the sufficiency of the count came to be considered. And in Withipole's Case, Cro. Car. 147, the court quashed one of two indictments, lest the prisoner should be

questioned on both. And in Rex v. Kinlock, 1 Wils. 157, Wright, J., against the other judges, held that to call a new jury would be to put the prisoner twice in jeopardy, although the former jury was discharged at his request; and upon report thereof the prisoner was pardoned.

An accessory may be put upon trial before judgment against the principal, but cannot be sentenced until after judgment against the principal, as in the recent Case of Elsie Whipple, 9 Cow. (N. Y.) 707. And in a civil case, where a judgment was not rendered, but a verdict taken before a justice was pleaded in bar, it was held a valid bar, as the justice could not arrest the judgment or grant a new trial. Felter v. Mulliner, 2 Johns. 181.

When, then, we consider the extreme jealousy which the common law evinces on this subject, supported by the provisions of the Constitution; when we find no case where a prosecution has been sustained after verdict upon a different count, and amidst so much doubt whether the legal principle as to the necessity of a judgment has been extended to cases of this kind; when we further find that both these prosecutions are in the same court, and no claim is made that judgment cannot be rendered upon the first verdict—I think the more correct rule to adopt is that under such circumstances a second information ought not to be supported, although judgment had not been actually entered upon the first at the time of pleading.

I would, therefore, affirm the judgment of the superior court.

The other Judges were of the same opinion; PETERS, J., doubting.

Judgment affirmed.

CHAMPNEYS' CASE.

(York Assizes, 1837. 2 Lew. 52.)

The prisoner, Champneys, was indicted as principal for delivering in a false schedule to the Insolvent Court, and the others for aiding and abetting him.[21]

Cottingham, for Champneys, pleaded ore tenus autrefois acquit, as to a part of the goods alleged to have been omitted from the schedule. * * *

Sir G. A. Lewin replied, that a man might well be acquitted as to some articles and not as to others, and that it was obvious, where fraud was intended, that concealment as to some might precede that of others.

PATTESON, J. If the articles, or any of them, are different, I am bound to proceed; but, if the offense should turn out to be substantially the same as that the prisoner has already been acquitted of, I shall recommend the jury to acquit. Whether at the former trial the proper evidence was adduced before the jury or not is wholly imma-

[21] Part of this case is omitted.

terial; for if, by any possible evidence that could have been adduced, he could have been convicted on that indictment, he is now entitled to an acquittal.

ROBERTS v. STATE.

(Supreme Court of Georgia, 1853. 14 Ga. 8, 58 Am. Dec. 528.)

The defendants, with others, were indicted for a robbery committed upon John Jackson, of said county. At March term, 1853, they filed a plea setting forth the record of a former indictment against them for burglary, upon which they had been tried and convicted, and which they averred to be the same felony, and none other, for which they were now indicted. To this plea, the Solicitor General in writing demurred, denying its sufficiency in law to operate the acquittal of the defendants. Upon consideration of such demurrer, the plea was overruled by the court, and the defendants required to answer over.[22]
* * *

STARNES, J., delivered the opinion. * * *

The main fact stated, and on which the plea rested, was that the defendants had been previously convicted on the charge of burglary, that judgment had been rendered on said conviction, and that the felony of which they had been so convicted was one and the same with the felony of which they then stood accused. Of course, the Solicitor, by so demurring, and admitting that this charge of robbery was the same felony as that of which the defendants had been convicted, intended only to admit that the two indictments related to the same transaction, and did not mean to admit that the charge was the same in each case. Taking this, then, as true, it becomes our duty to make the following inquiry: When a prisoner has been indicted for having burglariously broken and entered the dwelling of another with intent to steal the goods and chattels of the owner, and, in order to manifest such intent on the trial, proof be adduced that the prisoner did violently, or by intimidation from the person of the owner, steal such goods and chattels, and he be convicted, and afterwards an indictment for the robbery committed at the time be found against him, can he then be tried, if he plead autrefois convict, for such robbery as a separate offense?

The case made by this record invokes an answer from us to this question. The record, it is true, does not show that, upon the trial of these defendants for the burglary, that part of the evidence which

[22] Parts of the statement and opinion are omitted.

"An acquittal of the charge of larceny of certain goods is not a bar to an indictment for the larceny of certain other goods, although the last-mentioned goods are of such a character that the language of the first indictment might describe them." Per Curiam, in Commonwealth v. Sutherland, 109 Mass. 343 (1872).

was relied upon to show the felonious intent was the same with that which was offered upon the trial for robbery; but this is in effect admitted by the demurrer to the plea, as we have shown, and thus the question presented arises.

Of the sufficiency of the plea of former acquittal or conviction, the following is said to be a true test, viz.: Whenever the prisoner might have been convicted on the first indictment, by the evidence necessary to support the second; or, in other words, where the evidence necessary to support the second indictment would have sustained the first. Arch. C. P. 106; Rex v. Clark, 1 B. & B. 473; People v. Barrett, 1 Johns. (N. Y.) 66; Com. v. Cunningham, 13 Mass. 245; Hite v. State, 9 Yerg. 357; People v. McGowan, 17 Wend. 386; State v. Risher, 1 Rich. Law, 222; Durham v. People, 4 Scamm. 172; Com. v. Wade, 17 Pick. 400; 2 Hawks, 98.

This may be said to be the case in all compound felonies. 1 Ross on C. 89, note.

There seems to be some difficulty in applying this rule (as above expressed) in all cases. It may be said that the prisoner could not have been convicted on the indictment for burglary, by the proof necessary to convict on the indictment for robbery; and the evidence necessary to support the indictment for robbery would not have insured a conviction on the prosecution for burglary. If the indictment for robbery, however, had been first tried, then, upon the trial of the burglary, the proof necessary to support that last trial would have been such as would have been sufficient to sustain the first prosecution, because, after proof of the breaking and entering by the prisoner, the state would have proceeded to prove the violent stealing from the prosecutor, in order to show the breaking, etc., with felonious intent; and this would have been proof of the robbery.

To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps more accurately, expressed, viz., that the plea of autrefois acquit or convict is sufficient, whenever the proof shows the second case to be the same transaction with the first. Fiddler v. State, 7 Humph. (Tenn.) 508; Thach. 206, 207. That rule is decisive of this case. * * *

The rule above stated by me is that which is prescribed for this case, and it must be the law for these defendants.

This record shows that the transaction referred to in the indictment for burglary is the same with that in the prosecution for robbery, inasmuch as the pleader, in order to show the felonious intent, has made it necessary in the former to prove the circumstances of the stealing, and thus to involve the same transaction (the robbery) in both cases. If the pleader had alleged the breaking with felonious intent (which constitutes burglary), and had been able to prove, otherwise than by proof of the robbery, that the felonious intent was manifested, then the two might not have constituted the same transaction. But this was settled by the demurrer; and the state's counsel, having elected to

make his proof of felonious intent in this way, has put his case within the application of the rule.

In passing sentence upon these defendants, after the conviction in the case of burglary, the court no doubt graduated the penalty according to the circumstances of the transaction, thus taking into consideration the proof of the robbery; for it is to be presumed that a breaking and entering of a dwelling house, accompanied by an actual robbery, would have been more severely punished than a breaking and entering with an intent to rob which was not consummated. If this be so, and the defendants have been held to some degree of punishment in consideration of the robbery, to try them again for it would be, as it were, to place them in jeopardy a second time on account of the same offense, thus in some sort violating the fundamental principle on which the plea of autrefois acquit and convict rests. Hence, again, the propriety of the rule which we recognize and apply.

On this ground, we reverse the judgment of the court. * * *

STATE v. ROSENBAUM.

(Appellate Court of Indiana, 1899. 23 Ind. App. 236, 55 N. E. 110, 77 Am. St. Rep. 432.)

ROBINSON, J. Appellee was indicted for permitting a person named to be and remain in his place of business during prohibited hours, contrary to the provisions of section 3 of the act of March 11, 1895 (Acts 1895, p. 248). Appellee pleaded in abatement, setting up a former indictment and acquittal, that the person named in the present indictment as having been in the saloon was in company with the person named in the former indictment, and that the acts complained of in the present indictment are identical with those complained of in the former indictment, of which he had been acquitted. A demurrer to this plea was overruled, and upon this ruling the appeal is based.

The question presented is, can the proprietor of a place where liquors are sold, who permits two or more persons at the same time to be in the room during prohibited hours, be prosecuted for a separate offense as to each of such persons? The Attorney General, in his brief, states that he is of the opinion that the question must be answered in the negative. In Smith v. State, 85 Ind. 553, the court said: "The true test to determine the sufficiency or insufficiency of a plea of former acquittal as a bar to the pending prosecution is this: Would the same evidence be necessary to secure a conviction in the pending, as in the former, prosecution? If it would, then the plea of former acquittal would be a complete bar to the pending prosecution; otherwise, the plea would not be sufficient." The case of State v. Elder, 65 Ind. 282, 32 Am. Rep. 69, states the following rule: "When the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property

at the same time, belonging to the same person, a prosecution to final judgment for stealing a part of the articles will be a bar to a subsequent prosecution for stealing any other part of the articles stolen by the same act." See, also, State v. Gapen, 17 Ind. App. 524, 45 N. E. 678, and 47 N. E. 25; Davidson v. State, 99 Ind. 366; Fritz v. State, 40 Ind. 18; Wininger v. State, 13 Ind. 540; Brinkman v. State, 57 Ind. 76. The statute makes it unlawful for the proprietor to permit "any person or persons other than himself and family" to go into the room at prohibited times.

In the case at bar the crime committed was permitting "persons other than himself to go into such room" during prohibited hours. It was a single offense, which cannot be split up and prosecuted in parts. "A prosecution for any part of a single crime bars further prosecution based upon the whole or a part of the same crime." Laupher v. State, 14 Ind. 327. The appeal is not sustained.[23]

MOREY v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts, 1871. 108 Mass. 433.)

Writ of error to reverse the judgment of the superior court upon a conviction of the plaintiff in error on an indictment for adultery. Plea, in nullo est erratum.

The record showed that at September term, 1867, of the superior court in Norfolk, two indictments were found against the plaintiff in error, the first for lewd and lascivious cohabitation, and the second for adultery. The first indictment charged that he and Bridget Kennedy, on October 1, 1866, and "from that day continually to" August 1, 1867, at Quincy, "did lewdly and lasciviously associate and cohabit together," they "not being then and there married to each other." The second charged, in three counts, that on January 1, June 1, and August 1, 1867, respectively, at Quincy, he committed adultery with Bridget Kennedy, he "being then and there a married man and then and there having a lawful wife alive other than the said Bridget Kennedy," and he and said Bridget "not being then and there lawfully married to each other."

The record further showed that at said term, he and Bridget Kennedy were tried together on the first indictment, and found guilty, and he was sentenced thereon to confinement at hard labor in the House of Correction for two years, and that at the same term he was tried and found guilty on the second indictment, and sentenced thereon to confinement at hard labor in the House of Correction for three years,

[23] See, also, Ball v. State, 67 Miss. 358, 7 South. 353 (1889); State v. Ross, 4 Lea (Tenn.) 442 (1880); Irvin v. State, 7 Tex. App. 78 (1879).

A statute providing for an increased penalty for a second conviction for crime is not invalid, as putting the offender twice in jeopardy for the same offense. State v. Le Pitre, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922 (1909).

"this sentence to take effect from and after the expiration of his previous sentence at this term of the court."

The assignment of errors was that the sentence on the second indictment was wrongful, in that the plaintiff in error "had been previously convicted and sentenced to two years' confinement in said House of Correction for the same acts for which this sentence was awarded."

H. L. Hazelton, for the plaintiff in error. C. Allen, Attorney General, for the Commonwealth.

GRAY, J. A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

An acquittal or conviction upon an indictment for murder is a bar to a subsequent conviction upon an indictment for manslaughter or assault by the same act by which the murder was charged in the first indictment to have been committed, because such a conviction might have been had upon the first indictment. And so, e converso, an acquittal or conviction of the manslaughter is a bar to a subsequent indictment for the murder. Commonwealth v. Roby, 12 Pick. 496, 504, 505, and authorities cited; 1 Stark. Crim. Pl. (2d Ed.) 323, 324; 2 Russell on Crimes (4th Ed.) 55–59; Rev. St. c. 137, § 11; Gen. St. c. 172, § 16; Commonwealth v. Drum, 19 Pick. 479; Commonwealth v. Squire, 1 Metc. 258, 262; Commonwealth v. Lang, 10 Gray, 11; Commonwealth v. Squires, 97 Mass. 59.

On the other hand, a conviction of an assault with intent to murder was held by this court to be no bar to an indictment for murder, before our statutes permitted a conviction of such an assault upon an indictment for murder. Commonwealth v. Roby, 12 Pick. 496; St. 1805, c. 88, § 2; Rev. St. c. 137, § 11, and commissioners' note; Gen. St. c. 172, § 16.

A conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time, upon the ground that the lesser offense, which is fully proved by evidence of the mere fact of unlawfully making a sale, is merged in the greater offense; but an acquittal of the offense of being a common seller does not have the like effect. Commonwealth v. Jenks, 1 Gray, 490, 492; Commonwealth v. Hudson, 14 Gray, 11; Commonwealth v. Mead, 10 Allen, 396.

It has also been repeatedly held that the offenses of keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors, of illegally selling such liquors, and of doing secular business on the

Lord's day, are distinct offenses, and a conviction of the one is no bar to a conviction of either of the others, although the same acts of sale are relied on in proof of each. Commonwealth v. Bubser, 14 Gray, 83; Commonwealth v. Shea, 14 Gray, 386; Commonwealth v. Cutler, 9 Allen, 486; Commonwealth v. O'Donnell, 8 Allen, 548; Commonwealth v. Trickey, 13 Allen, 559; Commonwealth v. Hogan, 97 Mass. 122; Commonwealth v. Sheehan, 105 Mass. 192.

The case now before us cannot be distinguished in principle from those just cited. The indictment for lewd and lascivious cohabitation contained no averment and required no proof that either of the parties was married, but did require proof that they dwelt or lived together, and would not be supported by proof of a single secret act of unlawful intercourse. Commonwealth v. Calef, 10 Mass. 153. The indictment for adultery alleged and required proof that the plaintiff in error was married to another woman, and would be satisfied by proof of that fact and of a single act of unlawful intercourse. Proof of unlawful intercourse was indeed necessary to support such indictment. But the plaintiff in error could not have been convicted upon the first indictment by proof of such intercourse and of his marriage, without proof of continuous unlawful cohabitation; nor upon the second indictment by proof of such cohabitation, without proof of his marriage. Full proof of the offense charged in either indictment would not, therefore, of itself have warranted any conviction upon the other. The necessary consequence is that, assuming that proof of the same act or acts of unlawful intercourse was introduced on the trial of both indictments, the conviction upon the first indictment was no bar to a conviction and sentence upon the second, and that there is no error in the judgment for which it can be reversed.

The question of the justice of punishing the offender for two distinct offenses growing out of the same act was a matter for the consideration of the grand jury and the attorney for the commonwealth in the presentment and prosecution, of the court below in imposing sentence, or of the executive in the exercise of the pardoning power. It is not within the jurisdiction of this court as a court of error.

Judgment affirmed.

CHAPTER XI

PRESENCE OF THE DEFENDANT AT THE TRIAL

When any felons appear in judgment to answer of their felony, our will is that they come barefooted, ungirt, uncoifed, and bareheaded, in their coat only, without irons or any kind of bonds, so that they may not be deprived of reason by pain, nor be constrained to answer by force, but of their own free will; and then, agreeably to the presentment against them, let them be indicted.

Britton (Nichols-Baldwin) 29.

REG. v. TEMPLEMAN.

(Court of Queen's Bench, 1702. 1 Salk. 55.)

Upon a motion to submit to a small fine, after a confession of the indictment which was for an assault. * * *[1]

Defendants may submit to a fine, though absent, if they have a clerk in Court that will undertake for the fine. Hil. 2 Anne, Hickeringil's Case was, that he and his daughter were indicted for a trespass, and Hickeringil only appeared on the motion to submit to a small fine. But where a man is to receive any corporal punishment, judgment cannot be given against him in his absence, for there is a capias pro fine; but no process to take a man and put him on the pillory. Vide tit. Judgments, Duke's Case.[2]

HOPT v. PEOPLE OF THE TERRITORY OF UTAH.

(Supreme Court of the United States, 1883. 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262.)

HARLAN, J.[3] The plaintiff in error and one Emerson were jointly indicted in a court of Utah for the murder, in the first degree, of John F. Turner. Each defendant demanded a separate trial, and pleaded not guilty. Hopt, being found guilty, was sentenced to suffer death. The judgment was affirmed by the Supreme Court of the territory. But, upon writ of error in this court, that judgment was reversed, and the case remanded, with instructions to order a new trial. 104 U. S.

[1] Part of this case is omitted.

[2] "This was, however, not of course, but only in the discretion of the court." Rex v. Harwood, 2 Str. 1088 (1728).

[3] Part of this case is omitted.

631, 26 L. Ed. 873. Upon the next trial, the defendant being found guilty, was again sentenced to suffer death. That judgment was affirmed by the Supreme Court of the territory. We are now required to determine whether the court of original jurisdiction in its conduct of the last trial committed any error to the prejudice of the substantial rights of the defendant.

1. The validity of the judgment is questioned upon the ground that a part of the proceedings in the trial court were conducted in the absence of the defendant. Cr. Code Proc. Utah, § 218, provides that "if the indictment is for a felony the defendant must be personally present at the trial; but if for a misdemeanor the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the court may, upon application of the prosecuting attorney, by an order or warrant, require the personal attendance of the defendant at the trial." * * *

It appears that six jurors were separately challenged by the defendant for actual bias. The grounds of challenge in each case were denied by the district attorney. For each juror triers were appointed, who, being duly sworn, were, "before proceeding to try the challenge," instructed as required by section 252 of the Criminal Code; after which, in each case, the triers took the juror from the courtroom into a different room and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. Their findings were returned into court, and the challenge, being found not true, the jurors so challenged resumed their seats among those summoned to try the case. Of the six challenged for actual bias, four were subsequently challenged by the defendant peremptorily. The other two were sworn as trial jurors, one of them, however, after the defendant had exhausted all his peremptory challenges. No objection was made to the triers leaving the courtroom, nor was any exception taken thereto during the trial. The jurors proposed were examined by the triers, without any testimony being offered or produced, either by the prosecution or the defense.

It is insisted, in behalf of the defendant, that the action of the court in permitting the trial in his absence of these challenges of jurors was so irregular as to vitiate all the subsequent proceedings. This point is well taken. The Criminal Code of Utah does not authorize the trial by triers of grounds of challenges to be had apart from the court, and in the absence of the defendant. The specific provision made for the examination of witnesses "on either side," subject to the rules of evidence applicable to the trial of other issues, shows that the prosecuting attorney and the defendant were entitled of right to be present during the examination by the triers. It certainly was not contemplated that witnesses should be sent or brought before the triers without the party producing them having the privilege, under the supervision of the court, of propounding such questions as would elicit the necessary facts, or without an opportunity to the opposite side for cross-examination.

These views find some support in the further provision making it the duty of the court "when the evidence is concluded," and before the triers make a finding, to instruct them as to their duties. In the case before us the instructions to the triers were given before the latter proceeded with the trial of the challenges. But all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must be, "personally present at the trial."

The argument in behalf of the government is that the trial of the indictment began after, and not before, the jury was sworn; consequently that the defendant's personal presence was not required at an earlier stage of the proceedings. Some warrant, it is supposed by counsel, is found for this position in decisions construing particular statutes in which the word "trial" is used. Without stopping to distinguish those cases from the one before us, or to examine the grounds upon which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Criminal Code is, in prosecutions for felonies, to prevent any steps being taken in the absence of the accused, and after the case is called for trial, which involves his substantial rights. The requirement is not that he must be personally present at the trial by the jury, but "at the trial." The Code, we have seen, prescribes grounds for challenge by either party of jurors proposed. And provision is expressly made for the "trial" of such challenges, some by the court, others by triers. The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins.

But it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the courtroom, or to their trial of the several challenges in his absence. We are of opinion that it was not within the power of the accused or his counsel to dispense with statutory requirements as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority." 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except

in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Comm. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution. For these reasons we are of opinion that it was error, which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused. * * *

Judgment reversed.[4]

ADAMS v. STATE.

(Supreme Court of Florida, 1891. 28 Fla. 511, 10 South. 106.)

MABRY, J.[5] William Adams, the plaintiff in error, Ike Spanish and T. P. Bethea, were jointly indicted on the 26th day of February, A. D. 1891, at a term of the circuit court for Columbia county, Fla., for the murder of James Moore. * * *

The bill of exceptions shows that an objection was made by the counsel for the accused to the competency of Ike Spanish as a witness for the state, and pending the discussion of this question before the court the jury was sent from the courtroom. The officers who had the custody of the defendant, Adams, through mistake took him also from the courtroom, and carried him to jail. Counsel for the defendant then proceeded to discuss before the court the competency of Ike Spanish as a witness, and had proceeded about 10 minutes with the discussion in the absence of the prisoner, when his presence was missed. The state's attorney called the attention of the court to the absence of the prisoner, and thereupon the court requested the counsel for defendant to suspend his argument, which he did, at the same time

[4] The principle of this case has been applied in many jurisdictions to trials for felony. State v. Smith, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4 (1886); People v. Beauchamp, 49 Cal. 41 (1874). The weight of authority, however, allows the accused to waive his right to be present during a trial for felonies not capital. State v. Kelly, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299 (1887); Commonwealth v. McCarthy, 163 Mass. 458, 40 N. E. 760 (1895); Price v. State, 36 Miss. 531, 72 Am. Dec. 195 (1858). Cf. Lynch v. State, 88 Pa. 189, 32 Am. Rep. 445 (1878).

[5] Part of this case is omitted.

excepting to the removal of the prisoner from the courtroom without his consent, and of his being deprived of a right guarantied by the Constitution.

On the return of the prisoner to the courtroom the judge requested his attorney, in order to save any difficulty that might arise by reason of the inadvertence, to commence anew his argument, and that the court would hear his views and authorities anew. Defendant, by his counsel, declined to say anything further, but insisted that his objection to taking the accused from the courtroom be noted. Without any argument further, either from defendant or the state, the court decided that the witness was competent to testify against the accused. It was early decided in this state, and has been rigidly adhered to in later decisions, that the prisoner has the right to be and in fact must be present during the trial of a capital case, and no steps can be taken by the court in his absence. Holton v. State, 2 Fla. 476, 500; Gladden v. State, 12 Fla. 562; Irvin v. State, 19 Fla. 872.

There is no doubt about the fact that the accused here was taken from the courtroom and remained out for at least 10 minutes during the discussion of the competency of a witness against him. He has the right to be present and to hear questions of law as well as questions of fact discussed, and in fact no steps can be taken in the case in his absence. The court must see in capital cases that the accused is present before any proceedings are taken in the case. The fact that the court directed the argument to be gone over again could not possibly restore the accused to the position of hearing what had already been said in his absence. * * *

For the errors herein pointed out the judgment in this case must be reversed, and a new trial awarded.[6]

[6] In cases of felony it has been held that defendant must be present at the impaneling of the jury (Dougherty v. Commonwealth, 69 Pa. 286 [1871]), the swearing and examination of witnesses (Bearden v. State, 44 Ark. 331 [1884]; State v. Moran, 46 Kan. 318, 26 Pac. 754 [1891]), at the charge to the jury (Roberts v. State, 111 Ind. 340, 12 N. E. 500 [1887]), at the reception of the verdict (Summers v. State, 5 Tex. App. 365, 32 Am. Rep. 573 [1879]), at the discharge of the jury for failure to agree (State v. Wilson, 50 Ind. 487, 19 Am. Rep. 719 [1875]), and when sentence is given (French v. State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855 [1893]).

On the necessity for the defendant's presence at a view of the premises, the authorities are not in accord. See People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368 (1898); People v. Bush, 68 Cal. 623, 10 Pac. 169 (1886).

"While there is some conflict of authority upon the question, there is a great preponderance in favor of the proposition that, under such provisions, the absence of the accused at the hearing and decision of a motion for a change of venue, or continuance of the case, at the hearing and decision on motion in arrest of judgment, or at the hearing and decision of a demurrer to the indictment, will not vitiate the judgment in a case of felony; that it is not essential that the accused should be present at the filing and trial of motions and pleas not involving the question of guilt or innocence on the merits." Baskin, J., in State v. Woolsey, 19 Utah, 491, 57 Pac. 428 (1899).

CHAPTER XII

VERDICT

If they [the jurors] cannot all agree in one mind, let them be separated and examined why they cannot agree; and if the greater part of them know the truth and the other part do not, judgment shall be according to the opinion of the greater part.

Britton (Nichols) lib. 1, 12b.

ANONYMOUS.

(Court of Common Bench, 1367. Lib. Ass. 253, pl. 11.)

In another Assize before the same Justices at Northampton the Assize was sworn, and they were all agreed except one who would not agree with the eleven; and then they were remanded, and remained there all that day and the next without drink or food. And then it was demanded of him by the Justices if he would agree with his companions. He said never. That he would die first in prison. And upon this a day was given on the same verdict in the Common Bench. Kirk prayed judgment on the verdict. THORP said they were all in accord that this was not a proper verdict taken of eleven, no verdict could be taken of eleven. Nevertheless Kirk showed how Wilby in trespass took the verdict of eleven and sent the twelfth to prison, and the attaint was sued against the eleven. And also W. Thorp in an assize in the twentieth year of the present King took the verdict of twelve (sic). THORP. This is not a precedent for us, for he was greatly reproved for that. And afterward by assent of all the Justices it was agreed that this was not a proper verdict. Wherefore it was decided that this panel should be quashed and annulled and that he who was in prison should be released and that the plaintiff should sue out a new venire to summon the Assize.[1]

[1] "The parties to the litigation have 'put themselves' upon a certain test. That test is the voice of the country. Just as a corporation can have but one will, so a country can have but one voice—'le pays vint e dyt.' In a later age this communal principle might have led to the acceptance of the majority's verdict. But as yet men had not accepted the dogma that the voice of a majority binds the community. In communal affairs they demanded unanimity; but minorities were expected to give way. Then at this point the 'quasi judicial' position of the jurors becomes important. No doubt it would be wrong for a man to acquiesce in a verdict that he knew to be false; but in the common case—and it becomes commoner daily—many of the jurors really have no first-hand knowledge of the facts about which they speak, and there is no harm in a juror's joining in a verdict which expresses the belief of those of his fellows who do know something. Thus a professed unanimity is,

When the jury have come to a unanimous determination with respect to their verdict, they return to the box to deliver it. The clerk then calls them over by their names, and asks them whether they are agreed on their verdict, to which they reply in the affirmative. He then demands who shall say for them, to which they answer, their foreman. This being done, he desires the prisoner to hold up his hand, and addresses them: "Look upon the prisoner, you that are sworn. How say you, is he guilty of the felony (or treason, etc.) whereof he stands indicted, or not guilty?" If they say, "Guilty," then he asks them, "What lands or tenements, goods or chattels the prisoner had at the time of the felony committed, or at any time since?" to which they commonly reply, "None to our knowledge." If they say, "Not guilty," then the clerk asks them "whether he did fly for it or not." They commonly answer, "not to our knowledge," but, if they find a flight, it is recorded. The officer then writes the word "guilty" or "not guilty," as the verdict is, after the words "po. se." on the record; and again addresses the jury: "Hearken to your verdict as the court hath recorded it. You say that A. B. is guilty (or not guilty) of the felony whereof he stands indicted, and that he hath no goods or chattels, and so you say all." * * *

The verdict thus given is either general to the whole of the charge, partial as to a part of it, or special, where the facts of the case alone are found, and the legal inference is referred to the judges.

1 Chitty, Criminal Law, 635.

REX v. LEGINGHAM.

(Court of King's Bench, 1670. 2 Keb. 687.)

Stroud on 1 Inst. 227, b, prayed to set aside a privy verdict on information for unreasonable distress, sed non allocatur, for unless in cases of Felony, where the Party must be present at the delivery, it may be private, and so hath been the constant practice of forty years, as well where the King alone is Party, as in Actions qui tam; but the Court conceived that no information lieth for this offense, unless it be said as common Oppressor or Barretor; also privy verdict may be out of the County well enough. But adjornatur.

as our rolls show, very easily produced. Nor must it escape us that the justices are pursuing a course which puts the verdict of the country on a level with the older modes of proof. If a man came clean from the ordeal or successfully made his law, the due proof would have been given; no one could have questioned the dictum of Omniscience. The veredictum patriæ is assimilated to the judicium Dei. English judges find that a requirement of unanimity is the line of least resistance; it spares them so much trouble." 2 Pollock & Maitland, History of English Law, p. 624.

COMMONWEALTH v. GIBSON.

(General Court of Virginia, 1817. 2 Va. Cas. 70.)

The prisoner was convicted of murder in the second degree, and five years fixed on as the term of his imprisonment. When brought up to receive his sentence, he moved the court to set aside the pretended verdict alleged to be rendered against him, because the said pretended verdict is not the verdict of the jury sworn to try the prisoner, one of the jurors being absent from the rest, and out of the presence of the court at the time the said pretended verdict was received in the court, and at the time the jurors were discharged by the court, which was not known to the said prisoner, or his counsel, at the time of the rendition and reception of the said pretended verdict. He also moved the court to set aside the verdict (this ought to have been a motion to arrest the judgment), for that "he ought not by the laws of the land to be convicted of murder on the said indictment, the same being by law insufficient to charge him with the said crime." In support of his first proposition, he introduced Charles Woodson, one of the jurors, who, being sworn, said that he came into court with the rest of the jurors, after having agreed to a verdict against the prisoner, which was subscribed by Oglesby Scruggs, and that he remained in court until the jurors' names were all called over, and severally answered to, and, the clerk asking if the jury had agreed, it was answered they had, and the jury directed to look upon the prisoner, and, being asked if the prisoner was guilty or not, it was answered guilty, and the verdict delivered to the clerk, and the same that had been agreed to in the jury room, read aloud in open court; that being sick, and at this moment likely to faint, he requested one of the deputy sheriffs who was standing near him, in the rear of the jury, to attend him, and stepped into the jury room, where he laid down, and there remained until the jury were discharged; that he was not present in court at the discharge. Nor was he present when any alteration in the phraseology of the verdict was made in court, nor at any time after he had answered to his name, and heard the verdict which had been by the jury agreed on, in their room, read by the clerk as already stated. * * *

The evidence introduced by the prosecution satisfied the court that after the jury came into court, with their verdict written on the indictment and subscribed by one of their body, they were called over and answered severally to their names, declaring that they had agreed in a verdict, and, being told to look on the prisoner, they said he was guilty; the verdict was then delivered to the clerk, and by him read aloud in open court; the jury were not then immediately discharged by order of court, but some alteration in the terms of the verdict being suggested by the prosecutor, so as to make it read "public jail and penitentiary house," instead of "penitentiary," the clerk was ordered to make it in the presence of the court and jury. At this time it was not known that one of the jury had withdrawn

The clerk, to effect the alteration, wrote a verdict at large on the same indictment, in these words: "We of the jury find the prisoner guilty of murder in the second degree, and ascertain the term of his confinement in the public jail and penitentiary house to be five years," which was subscribed by William Watson, another of the jurors, and read aloud in open court, assented to by the jurors present, and the whole, being supposed to be present, were then discharged. The clerk ran his pen across the verdict delivered in by the jury in the first instance, without being directed so to do, that he might know which to regard in making up the record, and that the verdict which was at first delivered into court, and read as above stated, being the verdict agreed by the whole jury, is in these words: "We of the jury being impaneled for the purpose of trying Levi Gibson for the murder of his brother, Francis Gibson, are of opinion that the said Levi Gibson is guilty of murder in the second degree, and that he, the said Levi Gibson, be confined in the penitentiary for the term of five years." Signed: "Oglesby Scruggs."

On this statement and evidence, the superior court adjourned to this court the following questions:

(1) Can this court disregard the verdict which was written in court as above stated, and refer to the verdict which was first delivered by the jury into court, as above stated, as an existing verdict of the jury in the terms in which it is written? If so, (2) is this verdict sufficient to authorize this court to give judgment against the prisoner that he be confined in the "public jail and penitentiary house?" * * *[2]

The following is the judgment of THE COURT:

This court is of opinion, and doth decide, that the verdict which was written in court is a nullity, because it was only agreed to by eleven jurors, the twelfth juror having retired from the court before it was written and received, and that, therefore, the superior court ought to disregard the said verdict; and the court is further of opinion that, in a case of felony, after the verdict is rendered by the jury, and read in open court, it is the duty of the clerk to direct the jury to hearken to their verdict as the court has recorded it, and then to repeat the verdict to them, and either to poll them, or to say to them, "And so say you all," or words to that effect, in which latter case, if none of the jury express their dissent, the verdict ought to stand as recorded, and that until the assent of the jury is expressed in one of these ways the jury has a right to retract; and until after the assent of the jury is expressed as aforesaid, the verdict is not perfected; that the first verdict rendered in this case was imperfect in these particulars, and therefore no judgment can be rendered on it. * * *

This court is further of opinion that, the verdict being imperfect, it ought to be set aside, and a venire facias de novo awarded, and a new trial had of the prisoner, either on this indictment, as an indictment for manslaughter, or on a new indictment for murder, which is ordered to be certified, etc.

[2] Part of this case is omitted.

STATE v. DAWKINS et al.

(Supreme Court of South Carolina, 1890. 32 S. C. 17, 10 S. E. 772.)

McIver, J.[3] * * * The ninth and tenth grounds of appeal question the legality of the course pursued in the court below after the verdict had been rendered, and the jury discharged from the case, by reimpaneling them the next day, for the purpose of giving them instructions, inadvertently omitted before, as to their power to recommend to mercy, and the effect of such recommendation. We do not know of any authority for such a proceeding, and none has been cited. While we have no doubt whatever that the course pursued in this instance was prompted by the best motives, and was really designed to give the defendants the benefit of a merciful provision of the law, yet we feel bound to regard it as a dangerous innovation, upon well-settled legal principles, and one which is not sanctioned by any law. After a jury have rendered their verdict, and have been discharged, we know of no authority by which they can be reimpaneled, and, under further instructions, be called upon to render a new and different verdict. Such a power, once recognized, even in a case like this, where its exercise was doubtless intended in favor of liberty, would afford a precedent which might lead to the most dangerous consequences. But, without pursuing this line of remark, it is quite sufficient for us to say that it is without authority of law. We must therefore regard the second so-called "verdict" as an absolute nullity, and the judgment, which we must assume was rendered upon it, as without legal foundation, and should for that reason be set aside.

It may be said, however, that the first and only real verdict in the case would be sufficient to support the judgment. But it must be remembered that by the express terms of the statute (Gen. St. § 2481) the only judgment which would be legally rendered on that verdict would be imprisonment in the penitentiary with hard labor for life, and any other judgment would be erroneous and illegal; and, if so, then our plain duty is to reverse it. Now, while the nature of the judgment rendered in this case does not distinctly appear in the record, yet we are bound to infer from what does there appear that the judgment actually rendered was erroneous and illegal; for the act of 1883, amending the section of the General Statutes above referred to, expressly declares that where a person is convicted of burglary at common law, and is recommended to the mercy of the court by the jury, the punishment shall be reduced from that prescribed by that section of the General Statutes prior to the amendment. And as the manifest object of the circuit judge, in reimpaneling the jury, was to give these defendants the benefit of the reduction provided for, we are forced to the conclusion that the judgment rendered was based upon the second so-called "verdict."

[3] Part of this case is omitted.

The judgment of this court is that the judgment of the circuit court, so far as it concerns the appellant, William Dawkins, be reversed, and that the case be remanded to that court for a new trial as to said William Dawkins.[4]

COMMONWEALTH v. TOBIN.

(Supreme Judicial Court of Massachusetts, Suffolk, 1878. 125 Mass. 203, 28 Am. Rep. 220.)

Indictment for manslaughter. After verdict of guilty in the superior court, the defendant, on the same day, moved to set aside the verdict. * * *

GRAY, C. J.[5] By the law of England, in cases of felony, the only verdict allowed was a public verdict pronounced by the foreman in open court, and in the presence of the prisoner. In prosecutions for misdemeanors, and in civil cases, although the jury were permitted to separate upon giving a privy verdict orally to the judge out of court, yet such verdict was of no force unless afterwards affirmed by an oral verdict given publicly in court, and the only effectual and legal verdict was the public verdict. 3 Bl. Com. 377; 4 Bl. Com. 360; 1 Chit. Crim. Law, 635, 636.

In this country, by way of substitute for a privy verdict, and to attain the same end of allowing the jury to separate after they have come to an agreement, a practice has been adopted in civil actions, and in cases of misdemeanors, at least, if not of all but capital crimes, of directing the jury, if they should agree during the adjournment of the court, to sign and seal up their finding, and come in and affirm it at the next opening of the court; but the verdict which determines the rights of the parties, and is admitted of record, and upon which judgment is rendered, is the verdict received from the lips of the foreman in open court. When the jury have been permitted to separate after agreeing upon and sealing up a verdict, there is this difference between civil and criminal cases: In a civil action, if the written verdict does not pass upon the whole case, or the jury refuse to affirm it, the court may send them out again, and a fuller or different verdict afterwards returned will be good. But, in a criminal case, the oral verdict pronounced by the foreman in open court cannot be received, unless it is shown to accord substantially with the form sealed up by the jury before their separation. Lawrence v. Stearns, 11 Pick. 501; Pritchard v. Hennessey, 1 Gray, 294; Commonwealth v. Townsend,

[4] After the jury has been discharged, it is too late for a juror to say he did not assent to the verdict. Mercer v. State, 17 Ga. 146 (1855).

"Under our statute the verdict must be in writing; but this does not dispense with the requirements that the names of the jurors shall be called to ascertain that they are all present, and that they shall be asked if they all assent to the verdict." Maxwell, C. J., in Longfellow v. State, 10 Neb. 105, 4 N. W. 420 (1880).

[5] Part of this case is omitted.

5 Allen, 216; Commonwealth v. Durfee, 100 Mass. 146; Commonwealth v. Carrington, 116 Mass. 37; Dornick v. Reichenback, 10 Serg. & R. (Pa.) 84; Lord v. State, 16 N. H. 325, 41 Am. Dec. 729. * * *

In the case at bar, after the jury, upon their return into court, had been asked whether they had agreed upon their verdict, and the foreman had answered that they had, the form of verdict which had been signed and sealed up before the jury separated was silently delivered by the foreman to the clerk, and was opened and read by the clerk to the jury. The clerk thereupon told the jury (in the words accustomed to be used after a verdict has been pronounced by the foreman and minuted by the clerk) to hearken to their verdict as the court had recorded it. And the bill of exceptions states that "the above is all that was said."

In Commonwealth v. Carrington, already cited, upon which the Attorney General principally relies, the bill of exceptions stated that, before the verdict was recorded, the clerk asked the jury if their verdict was that the defendant was guilty, to which they assented; and, although the precise form in which such inquiry and response were expressed was not set forth in the bill of exceptions, it was assumed, both by the counsel and by the court, that an oral verdict had been returned in due form, if any such verdict could be received after the jury had separated and had brought in a sealed verdict.

But, in the present case, it distinctly appears that when the clerk told the jury to hearken to their verdict as recorded, no legal or effectual verdict had been returned by the jury, and they had not been asked, nor in any form of words orally and publicly stated, what their verdict was, and that, after they had been told that a verdict of guilty had been recorded, they simply said nothing. A verdict which has never been spoken by the jury cannot be implied from the mere omission of the jury to contradict the statements of the clerk, or from the silence of the prisoner and his counsel.

The verdict received and recorded by the court not being a legal verdict, it was the right of the defendant, upon his motion filed on the same day, to have it set aside. The order of the superior court, overruling this motion and denying him this right, was a decision upon a question of law which could not have been raised before verdict, and was therefore a proper subject of a bill of exceptions. Gen. St. c. 115, § 7. * * *

Exceptions sustained.

HUNTER v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1875. 79 Pa. 503, 21 Am. Rep. 83.)

Mr. Justice PAXSON delivered the opinion of the court, November 15, 1875.[6]

The plaintiff in error was indicted for a felonious assault. The jury convicted him of assault. A motion in arrest of judgment was made, which was overruled by the court below, and judgment entered on the verdict. This is assigned here for error.

The record presents the single question whether, upon an indictment charging a felony, the jury may acquit of the felony, and convict of the constituent misdemeanor. We are in no doubt as to the rule at common law. It was long held in England that upon an indictment for a felony there could be no conviction for the minor offense of misdemeanor. Rex v. Cross, 1 Ld. Raym. 711, 3 Salk. 193; 2 Hawk. c. 47, § 6; 1 Chit. C. L. 251, 639. The reason of the rule was that persons indicted for misdemeanors were entitled to certain advantages at the trial, such as the right to make a full defense by counsel, to have a copy of the indictment, and a special jury, privileges not accorded to those indicted for a felony. It is apprehended these reasons no longer exist in England—at least not to the extent they did formerly, for by St. 1 Vict. c. 85, § 11 (Lord Denman's act), the rule itself has been abolished, and now upon a bill charging a felony a conviction may there be had for a constituent misdemeanor. It is clear that the reason of the rule has no application in this state. On the contrary, the advantages, if any, upon the trial, are all in favor of those charged with a felony. By the merciful provisions of our criminal law, the higher and more atrocious the crime, the more numerous are the safeguards thrown around the accused, and the more jealously does the law guard every legal right to which he is entitled.

The rule in other states of this country is by no means uniform. It is said by Mr. Wharton, in his work on Criminal Law (section 400), that the old common-law rule is still followed in Massachusetts, Indiana, and Maryland; while in New York, Vermont, New Jersey, Ohio, North Carolina, South Carolina, and Arkansas it has been held that, the reason of the English rule having ceased, the rule itself ceases, in obedience to the maxim "Cessante ratione legis cessat ipsa lex."

* * *

The general rule is well settled that, upon an indictment charging a particular crime, the defendant may be convicted of a lesser offense included within it. Thus upon an indictment for murder the prisoner may be convicted of manslaughter; a person charged with burglary may be convicted of larceny, if the proof fail of breaking and entering; a person charged with seduction may be convicted of fornica-

[6] Part of this case is omitted.

tion (Dinkey v. Commonwealth, 17 Pa. 127, 55 Am. Dec. 542); when persons are indicted for riotous assault and battery, they may be convicted of assault and battery only (Shouse v. Commonwealth, 5 Barr, 83); when the charge is assault and battery, a conviction may be had for assault. Instances of this kind might be multiplied indefinitely if necessary. * * *

The judgment of the court of quarter sessions is affirmed.[7]

STATE v. GREEN.

(Supreme Court of North Carolina, 1896. 119 N. C. 899, 26 S. E. 112.)

FURCHES, J.[8] This is an indictment for a secret assault with a deadly weapon (a gun) with intent to kill, under chapter 32, Laws 1887. Under instructions from the court the jury found the defendant "guilty as accessory," and upon this verdict the court pronounced judgment, and the defendant appealed. * * *

We have no means of knowing from this indictment and verdict whether the defendant was convicted as accessory before or after the fact. But neither of these offenses is the same offense as that charged in the bill of indictment, nor is either one of them a less degree of the same offense as that charged in the bill. There were other matters discussed in the argument before us that we do not consider and pass upon, as they are not likely to arise again upon a new trial. There is error, and a new trial is awarded the defendant.

New trial.[9]

[7] At the early common law it appears that not only could the accused be convicted for a misdemeanor on an indictment setting out the special circumstances of the case, charging the acts alleged to have been done feloniously, if the acts amounted to a misdemeanor only, Holmes' Case, Cro. Car. 376 (1634); Joyner's Case, Kel. 29 (1664), but even on a general indictment for felony, in which the misdemeanor was not charged, if a special verdict was found. Leeser's Case, Cro. Jac. 497 (1618). But in Westbeer's Case, 2 Str. 1133 (1740), one was indicted for feloniously stealing a parchment, and the jury found a special verdict by which it appeared that the parchment concerned the realty. The court held that, the prisoner being not guilty of the felony, he could not be convicted of the misdemeanor, and said, referring to the cases cited above: "In the cases cited pro rege, the judges appear to be transported with zeal too far."

[8] Part of this case is omitted.

[9] Accord: Where the verdict does not contain the name of the defendant. Williams v. State, 6 Neb. 334 (1877). Or show on which of several counts the defendant is found guilty. Day v. People, 76 Ill. 380 (1875). Or to which of several defendants the verdict applied. People v. Sepulveda, 59 Cal. 342 (1881); Favor v. State, 54 Ga. 249 (1875). See, also, State v. Coon, 18 Minn. 518, Gil. 464 (1872); Wells v. State, 116 Ga. 87, 42 S. E. 390 (1902); State v. Pierce, 136 Mo. 34, 37 S. W. 815 (1896).

KLEIN v. PEOPLE.

(Court of Appeals of New York, 1864. 31 N. Y. 229.)

INGRAHAM, J.[10] The prisoner was indicted with Barbara Klein for grand larceny. When the case came on for trial, Klein pleaded guilty of an attempt to commit grand larceny. Myer was then tried and found guilty. The prisoner now moves in arrest of judgment, on the ground that both defendants must be convicted of the same offense, and not of different grades of offense. There can be no doubt that one defendant might have been acquitted and the other convicted, and such conviction have been good. And it has been held that where two are charged with a joint offense, either may be found guilty. R. v. Hempstead, R. & R. 344. But where persons are jointly indicted for a joint offense, they cannot be convicted of separate offenses; and if the act is indivisible, such as conspiracy or riots, then one cannot be convicted without the other. Stephens v. State, 14 Ohio, 388; State v. McO'Blenis, 21 Mo. 272; Pennsylvania v. Huston, Add. (Pa.) 334. But, except in indictments for offenses necessarily joint, joint defendants may be convicted of different grades. Shorese v. Caw, 5 Barr. 83; R. v. Butterworth, R. & R., 520. And they may be convicted of different degrees of criminality in the same offense, where the defendants may act different parts in the same transaction. Thus, where two defendants are charged with murder in the same indictment, the jury may find one guilty of murder and another of manslaughter. United States v. Harding, 1 Wall. Jr. 127, Fed. Cas. No. 15,301; Mask v. State, 32 Miss. 406. So, in a charge of burglary, one may be convicted of burglary and another of grand larceny, where the first one broke open the house and the other afterwards entered, and the two committed the larceny. Russ. & Ry. C. C. 520.

In the present case, the prisoner Klein pleaded guilty of an attempt to commit grand larceny. This she might have done without necessarily being proven guilty of the further offense. After the plea was put in, she was considered as if she had been tried separately and acquitted, or convicted of a lesser grade. It did not prevent the trial of the prisoner Myer, nor his conviction of the whole charge, any more than if both had been indicted for murder, and one on a separate trial had been convicted of manslaughter; or, in an indictment for burglary, if one had been convicted of larceny, the other might afterwards be convicted of burglary.

I understand the rule to be, if both are convicted of offenses in the same continuing transaction, they may be convicted of different degrees, if the prisoners take different parts in the commission of the same offense.

The prisoner was properly convicted, and the judgment should be affirmed.[11]

[10] Part of this case is omitted.

[11] Compare Rex v. Hempstead, Russ. & Ry. 344 (1818).

REX v. TURNER et al.

(Old Bailey, 1663. Sid. 171.)

Turner and others were indicted for that they feloniously and burglariously broke the mansion house of Francis Tryan in a certain ward in London, and there stole money and jewels to the value of £5,000. And after not guilty pleaded. and much evidence, the jury found Turner guilty of burglary (for which he was afterward hung in Cheapside) and one of the sons guilty of felony (et the others they acquitted) and the question was if this was a good verdict as to the felony against the son. It seemed to the two Chief Justices and others that it was not; for, although the jury might have found all guilty of felony, they could not find one guilty of burglary and the others of felony upon the same indictment and the same evidence.

SELVESTER v. UNITED STATES.

(Supreme Court of the United States, 1897. 170 U. S. 262, 18 Sup. Ct. 580, 42 L. Ed. 1029.)

Mr. Justice GRAY, Mr. Justice BROWN, and Mr. Justice SHIRAS concurred in part,[12] as follows:

We concur in the judgment of affirmance, and upon this short ground: The indictment contained four counts. The defendant pleaded not guilty to the whole indictment, and thereby joined issue on each and all of the counts, and the jury might find the defendant guilty upon all or any of them. The jury did return a verdict of guilty upon each of the first three counts, and disagreed as to the fourth count. The jury thus answered the whole of the issue presented by the plea to each of the first three counts, and failed to answer the issue presented by the plea to the fourth count. Their failure to return a verdict on the fourth count did not affect the validity of the verdict returned on the other three counts, or the liability of the defendant to be sentenced on that verdict. The defendant was sentenced upon those counts only upon which he had been convicted by the jury. There is no error, therefore, in the judgment rendered upon the verdict.

But in so much of the opinion of the court as suggests that the plaintiff in error may be hereafter tried, convicted, and sentenced anew upon the fourth count, we are unable to concur. No attempt has been made to try him anew, and the question whether he may be so tried is not presented by this record. Upon principle, on one indictment, and against one defendant, there can be but one judgment and sentence, and that at one time, and for the offense or offenses of which he has

[12] The statement of facts and the opinion of the court, delivered by Mr. Justice White, are omitted.

been convicted; and a sentence, upon the counts on which he has been convicted by the jury definitely and conclusively disposes of the whole indictment, operates as an acquittal upon, or a discontinuance of, any count on which the jury have failed to agree, and makes any further proceedings against him on that count impossible. No case has been found in which, after a conviction and sentence, remaining unreversed, on some of the counts in an indictment, a second sentence, upon a subsequent trial and conviction on another count in the same indictment, has been affirmed by a court of error.

In Ballew v. U. S., 160 U. S. 187, 203, 16 Sup. Ct. 263, 40 L. Ed. 388, and in Putnam v. U. S., 162 U. S. 687, 715, 16 Sup. Ct. 923, 40 L. Ed. 1118, in each of which a judgment upon conviction on an indictment containing two counts was affirmed as to one count, and reversed as to the other count, the order of reversal did not direct a new trial on the latter count, but was guardedly framed in general terms "for such proceedings with reference to that count as may be in conformity to law"; and under such an order it would be open to the defendant, if set at the bar to be tried again on that count, to plead the previous verdict and sentence in bar of the prosecution.[13]

STATE v. FRENCH.

(Supreme Court of Louisiana, 1898. 50 La. Ann. 461, 23 South. 606.)

BREAUX, J.[14] The state in this case appealed from an order sustaining a motion in arrest of judgment. The defendant was prosecuted upon an information containing two counts. In one count, he was charged with having stabbed with intent to murder; in the other count, with having willfully and maliciously, with a dangerous weapon, inflicted a wound less than mayhem. The verdict found was, "Guilty of wounding less than mayhem." * * *

The defendant avers that the verdict, "Guilty of wounding less than mayhem," is not responsive to the offenses charged in the information. In the first place, it is evident that the verdict was not a general verdict, but one that the jury found without special reference to the offense charged in either count of the information. It was a verdict of their own selection. They had been instructed by the court regarding the form of the verdict, as follows: "You may render one of five verdicts. (1) You may find the prisoner at the bar, 'Guilty as charged in the first count of the information;' (2) you may find him, 'Guilty

[13] Where the counts are for the same offense, see Commonwealth v. Fitchburg R. R., 120 Mass. 372 (1876).

"It was held at an early day, in this court, that one good count was sufficient to uphold a general verdict and judgment upon all the counts, though some of them might be bad." Nelson, J., in Clifton v. U. S., 4 How. 250, 11 L. Ed. 957 (1846).

Contra: O'Connell v. Reg., 11 Cl. & F. 155 (1844). And see Avirett v. State, 76 Md. 510, 25 Atl. 676, 987 (1893).

[14] Part of this case is omitted.

of stabbing with a dangerous weapon with intent to kill,' as charged in the first count; (3) you may find him, 'Guilty as charged in the second count;' (4) you may find him, 'Not guilty;' or (5) you may find him, 'Not guilty, on the ground of insanity.' If you find the defendant was insane at the time of the commission of the act, you should qualify your verdict of 'Not guilty' by the addition of the phrase 'on the ground of insanity.'" The jury did not follow the instruction. It was within their power to find a particular verdict in language of their own, and if it covers an offense denounced by the statute, or an offense of a lower degree, included under the terms and conditions of the offense charged, it would be a sufficient verdict.

Taking an example of the most ordinary sort, the charge being murder, the jury may find the defendant guilty of manslaughter; or, the charge being burglary, if larceny only be proven the accused may be found guilty of larceny; so in all cases of offense of less degree of the same class. But the finding of the jury in such cases must be of an offense complete in itself. The offense must be completely stated. No valid judgment can be pronounced upon the partial verdict, which fails to find the ingredients essential to constitute the crime.

To illustrate by another example of a familiar kind: If a jury were to return in court that an accused was guilty of taking the goods of another without any intimation as to the asportation and appropriation of the goods, it is useless to state that the finding would be void. Not so if they were to return that he is "guilty of larceny," for that word embraces all the ingredients essential to constitute the crime of stealing. Larceny, manslaughter, and other words denoting crimes have a well-defined meaning. They are in themselves a definition. No one can be misled, or there need not be the least confusion, when these names are made use of. If the jury undertakes to define the crime, it should be by a name in which there can arise no confusion or ambiguity, or, if it is not identifiable by a well-known name, then the description should include the essentials to constitute the crime. In one case in this state, the court went to the extreme of holding that only a general verdict could, under the law, be found. State v. Jurche, 17 La. Ann. 71. That limit, properly, has not always been observed.

Special and particular verdicts may be found with the understanding that the name of the crime when it has a name, or the facts when it has not, necessary to constitute the crime are fully and explicitly stated. The court cannot supply the facts necessary to constitute the crime. 2 Hawk. P. C. 622; State v. Blue, 84 N. C. 809. "The omission of any fact necessary to constitute the offense is fatal." 3 Whart. Cr. Law, § 3188. Where "intent" is one of the essential ingredients of the crime, it must be found in a special verdict, in order to sustain a judgment. The crime denounced in the case before us for decision, we have seen, includes "intent" as an essential ingredient.

No one, unless acting willfully and maliciously with intent, is guilty of inflicting a wound less than mayhem. In our view, the verdict

was defective. It failed to find the criminal intent. It is defective whether construed as a special or a partial verdict. In a very recent case this court held that it was not permissible to go beyond the words used by the jury in matters essential to the finding that a crime has been committed by the accused. State v. Bellard, 50 La. Ann. 594, 23 South. 504, 69 Am. St. Rep. 461. In another, also a case recently decided (State v. Hearsey, 50 La. Ann. 373, 23 South. 372), the court extended the rules of practice much further than there is any necessity of extending in the case here. The rule applying is sustained by a number of well-considered decisions, notably the cases of United States v. Buzzo, 18 Wall. 125, 21 L. Ed. 812, and State v. Burdon, 38 La. Ann. 357. In the former the court said, in construing a special verdict, that the intention is of the essence of the crime, and is not found by the special verdict; no judgment can be entered on the verdict. And, in the latter cited case, the court, in substance, with reference to the finding of a jury, said: "What is not found is not supposed to exist"—citing State v. Ritchie, 3 La. Ann. 512.

There are views not in accord with those we have here expressed. The prosecuting officers have directed our attention to them, and particularly to the case of State v. Mason, 42 La. Ann. 715, 7 South. 668. For the reasons before stated, we cannot adhere to the decision in the Mason Case. We are constrained to adhere to decisions we before cited. We think they are correct in law.

It is therefore ordered and decreed that the judgment appealed from is affirmed.

REX v. LORD FITZWATER.

(Court of King's Bench, 1675. 2 Lev. 139.)

Information in the nature of a quo warranto for fishing in the river Thames in a place extending in B in seven parishes as appears upon the record.[15] After verdict for the defendant it was moved in arrest of judgment. * * * And afterward in Mich. term the verdict was set aside upon affidavits that the jury cast lots for their verdict and gave verdict according to the lot. * * *[16]

[15] Part of this case is omitted.

[16] Accord: White v. State, 37 Tex. Cr. R. 651, 40 S. W. 789 (1897). In Vaise v. De Laval, 1 Term R. 11 (1785), Lord Mansfield refused to receive as evidence affidavits of a juror that the jury had determined their verdict by lot. But see White v. State, 37 Tex. Cr. R. 651, 40 S. W. 789 (1897).

GLIDEWELL v. STATE.

(Supreme Court of Tennessee, 1885. 15 Lea, 133.)

WILSON, Special Judge, delivered the opinion of the court.[17] * * *

The next contention is that the verdict should have been set aside, and a new trial granted, because, as it is shown by the affidavits of two of the jurors, the jury, in considering of their verdict, differed among themselves as to the time the prisoner should be imprisoned, and therefore it was agreed among them that each juryman should set down the time he was for, and the product of the aggregate divided by twelve was to be accepted and returned as the verdict of the jury, which was done. If the facts were this way, they would clearly, under our authorities, vitiate the verdict, and it should be set aside.

But upon a careful examination of the record we find the facts to be otherwise, even as detailed by the jurors who give their affidavits. Each juror, it seems, did set down or announce the time or number of years he thought the prisoner ought to be confined, and the result of this aggregate divided by twelve was the verdict agreed upon and returned by the jury. But there was no agreement or understanding, expressed or implied, tacit or otherwise, before this aggregation and division were made, that the result should be their verdict; nor was it in any way to bind the assent or influence the judgment of the individual members of the jury.

And it is the fact of an agreement or understanding, before this method of reaching a result is adopted, or while it is in process of execution, to be bound by its result, and to accept it, that vitiates the verdict. If this be the true test, much less should we be inclined to set aside a verdict, in the absence of an agreement or understanding beforehand to be bound by the result reached under this method, when we can see that the method and its result were not even used as an argument with any member of the jury to secure his acquiescence in the result. No authority we have been able to find, certainly none in this state, holds that a verdict is vitiated simply because the jury put down the time each was for confining the prisoner on trial before them, added all of them together, divided the total by twelve, and adopted, after consultation and agreement, the product as their verdict, when there was no agreement or understanding beforehand to do so, and when the method adopted and its result were not used as an argument to influence an unwilling or hesitant member to acquiesce in it. This is the category in which we find this case. * * *

The judgment of the court below is therefore reversed, and the cause will be remanded for a new trial.[18]

[17] Part of this case is omitted.

[18] Accord: Thompson's Case, 8 Grat. (Va.) 637 (1851); Cochlin v. People, 93 Ill. 410 (1879).

CHAPTER XIII

NEW TRIAL

REX v. INHABITANTS OF OXFORD.

(Court of King's Bench, 1811. 13 East, 411.)

This indictment, for the nonrepair of a public bridge over the river Cherwell, called Enslow Bridge, within the county of Oxford, was preferred at the assizes for the county of Oxford, and was tried before Lawrence, J., at the last assizes at Oxford, when the defendants were found guilty; the question made at the trial being whether certain persons were bound to the repair ratione tenuræ. And now

Jervis, on behalf of the defendants, prayed the court for a certiorari to remove the indictment and proceedings into this court, for the purpose, as he stated, of moving for a new trial; the verdict being against the evidence and the direction of the learned judge who presided at the trial. He admitted that in case of The King v. Elizabeth Nicoll, 14 East, 211, note, where the proceedings on an indictment at Hick's Hall for a conspiracy were removed by certiorari between verdict and judgment, this court, referring to The King v. Baker, said that they could not give judgment, not being apprised of the circumstances of the offense. But that difficulty will not arise in this case, where the object is to bring the whole evidence in review before the court upon the learned judge's report. It is of great consequence to those concerned that a verdict given against evidence and the direction of the judge should in some mode or other be corrected.

Lord ELLENBOROUGH, C. J. It is also of great consequence that we should not, without precedent, and against authority intrude upon all the inferior jurisdictions in the kingdom (for if we do it in one case, there is no reason why we should not be called upon to do it in all), by removing hither their proceedings after verdict and before judgment, for the purpose of examining the evidence on which the verdicts have been obtained. There would be no end of such investigations. But I would not have the notion for a moment entertained that we have the power of entering into the merits of verdicts, and granting new trials in proceedings before inferior jurisdictions.

BAYLEY, J., assenting, the certiorari was denied.

GRAY v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1882. 101 Pa. 380, 47 Am. Rep. 733.)

PAXSON, J.[1] This cause was argued here as upon a motion for a new trial, and two of the assignments of error are to the refusal of the court to grant it. We ought not to be called upon at this late day to say that it is not within the line of our recognized duties to correct supposed errors in the lower courts in this manner. Nor are capital cases an exception to this rule. We are not jurors, and are not called upon to weigh the evidence even when a human life is at stake, further than to say, when called upon to do so in an orderly manner, whether there is sufficient evidence to submit to the jury upon a particular question of fact. If the jury make a mistake, the remedy is a motion for a new trial in the court below. If a new trial is refused, where upon the evidence it ought to have been granted, and the judgment is affirmed here upon the law of the case, the only remedy is an appeal to the pardoning power. It is foreign to our duties to interfere in such cases, nor do we see that any practical good would result from our assuming such a jurisdiction. It is better for the administration of the criminal law that each department of the government concerned therein should confine itself to those duties which the law has assigned to it, and which long experience has shown to be wise and proper. * * *

The judgment is affirmed.

COMMONWEALTH v. GREEN.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket, 1822. 17 Mass. 515.)

PARKER, C. J.[2] The prisoner, having been convicted, by the verdict of a jury, of the crime of murder, at the last term of the court, moved for a new trial, because, as alleged in his motion one Sylvester Stoddard, who had been sworn as a witness on the part of government, and who had testified to the jury, had been convicted of the crime of larceny, in a court having jurisdiction of the offense, within the state of New York, whereby, as is alleged, he was rendered infamous, and for that reason his testimony could not be received in a court of justice in this commonwealth. A copy of the record of that conviction has been produced in support of the motion; and sufficient

[1] Part of this case is omitted.

"The refusal of a motion for a new trial is an error in law only when it is apparent that such refusal amounts to a clear abuse of discretion." Williams, J., in Commonwealth v. Roddy, 184 Pa. 292, 39 Atl. 211 (1898). Cf. People v. Francis, 52 Mich. 575, 18 N. W. 364 (1884); Omeara v. State, 17 Ohio St. 515 (1867); Reinhart v. State, 45 Ind. 147 (1873).

[2] Part of this case is omitted.

evidence has been given to satisfy the court, for the purpose of sustaining this motion, that the Sylvester Stoddard, who was sworn and examined on the trial of the prisoner, was the subject of that conviction. It appeared also, that judgment was rendered upon that conviction, and was executed upon the convict, within the public prison of the state of New York.

It has been argued by the Attorney and Solicitor General, that by law a new trial cannot be granted of a capital felony; and it appears by the English text-books, and by several decisions cited in support of the position, that in cases of felony, a new trial is not usually allowed by the courts of that country. But whatever reasons may exist in that country for this practice, we are unable to discern any sufficient ground for adopting it here.

That a prisoner, who has been tried for a felony, and acquitted, should not be subjected to a second trial for the same offense, seems consistent with the humane principles of the common law, in relation to those whose lives have been once put in jeopardy. But the same humane principles would appear to require that, after a conviction, a prisoner should be indulged with another opportunity to save his life, if anything had occurred upon the trial which rendered doubtful the justice or legality of his conviction. "Nemo bis debet vexari, pro una et eadem causa," is a maxim of justice, as well as of humanity, and was established for the protection of the subject against the oppressions of government. But it does not seem a legitimate consequence of this maxim that one who has been illegally convicted should be prevented from having a second inquiry into his offense, that he may be acquitted, if the law and the evidence will justify an acquittal.

It is true that, in England, the utmost caution is used on capital trials in favor of life; and if an irregularity materially affecting the trial occurs to the injury of the accused, the court usually represents such matter to the crown, and a pardon is generally granted. But it is the right of every subject of that country, and of every citizen of this, to have a fair and legal trial before his peers, the jury; and it is hardly consistent with that right that it should be left to the will or discretion of the judge whether a representation of an actual irregularity shall be made to the pardoning power, or to the discretion of the latter whether that power shall be exercised in favor of a person unlawfully convicted.

Where the error appears of record, in either country, the court will arrest the judgment after a verdict of guilty; and the party may be again indicted, and tried, for the same offense. If the error does not appear of record, but arises from inadvertency of the judge in rejecting or admitting evidence, or from misbehavior of the jury, or other cause which would be good ground for a new trial in civil actions or misdemeanors, justice and consistency of principle would seem to demand that the person convicted should, upon his own motion, have another trial, instead of being obliged to rely upon the disposition of

the court to recommend a pardon, or of the executive power to grant it. It is not enough that the life of the accused will generally be safe in the hands of such highly responsible public agents. The right of the subject to be tried by his peers, according to the forms, as well as principles, of law, is the only certain security that at all times and under all circumstances that protection which the Constitution extends to all will be effectually enjoyed.

Nor is it for the public safety and interest that new trials should be refused in such cases; for it must be obvious that in most cases of irregularity, which would be a good cause for another trial, if in the power of the court to grant it, a pardon, upon the representation of the court, would be thought to follow of course, and thus, in many cases, public justice might be prevented on account of defect in form, or some irregularity, not affecting the merits of the case, which mischief might be avoided by another trial.

For these reasons we think there is a power in this court to grant a new trial on the motion of one convicted of capital offense, sufficient cause being shown therefor, notwithstanding the English courts are supposed not to exercise such authority; and if this opinion needs support, the case of John Fries, who, after conviction of treason, was tried a second time, and the case in South Carolina, cited at the bar from Bay's Reports, are sufficient for this purpose. In the case of United States v. Fries, 3 Dall. (Pa.) 515, Fed. Cas. No. 5,126, 1 L. Ed. 701, Mr. Rawle, the district attorney, admitted the power of the court to grant a new trial, and argued only against the propriety of exercising the power in that case. Judge Iredell expressly admitted the power, and Judge Peters, who was against a new trial, although he yielded to the Circuit Judge, did not deny the authority of the court to grant it. In a late case, also, in New York, People v. Goodwin, 18 Johns. 187, 9 Am. Dec. 203, which was a case of felony, it was decided that the cause might be taken from the jury, and a new trial ordered. * * *

Having decided that to grant new trials in capital cases is within the power of the court, and that the exercise of this power, where there has been no error on the trial, is discretionary, if every suggestion should be listened to, without regard to the merits of the case, or the just bearing of the fact suggested, it is certain that the course of public justice would be much obstructed, and that the punishment of crimes would often be evaded. It is a power to be used sparingly for the protection of innocence, not to screen the guilty.

Now, in the case before us, the only advantage the prisoner would have on another trial, which he had not before, would be to show that Stoddard, one of the witnesses who testified against him, was not deserving of credit, because he had been convicted of larceny in New York. If this witness had gone to the jury wholly unimpeached, and his testimony had been material and uncorroborated, the case

would be a strong one for the exercise of the discretion of the court in granting another trial.

But this witness was impeached at the trial, by the evidence of two convictions of larceny within the commonwealth; and it was known to the jury that he had but just left the public prison, under a pardon granted by the executive, for the sole purpose of rendering him a competent witness. Surely evidence of another conviction of a similar offense in another state, of which he had not been pardoned, would have added nothing to the weight of evidence against his credibility. He was considered as a degraded person, both by the court and jury; and in the charge to the latter by the court they were expressly told that, unless they found his testimony corroborated by unimpeached witnesses, he ought not to be believed. The same observations applied to another witness, who appeared under similar circumstances.

In the opinion of the court, there was sufficient evidence to justify the verdict without the testimony of either of those men. * * *

Under these circumstances, to grant a new trial would be only to prolong the suspense and increase the anxiety of the prisoner, without any final advantage to him; and we do not feel authorized to surrender the principles of justice to feelings of compassion or sympathy.

Motion overruled.[3]

[3] Compare State v. David, 14 S. C. 428 (1881).

"Besides writs of error, motions for new trials are permitted in some cases of misdemeanor, namely, cases of misdemeanors tried before the Queen's Bench Division in the exercise of its original jurisdiction, or sent down by that division to be tried at the Assizes on the nisi prius side. If a misdemeanor is tried before commissioners of oyer and terminer at the Assizes or at the Quarter Sessions, the Queen's Bench Division will not after verdict remove the case by certiorari, with a view to granting a new trial. If the parties wish to have the possibility of applying for a new trial, or to have a special jury, their course is to apply for a certiorari before the case comes on to be tried. If the court is satisfied that questions of difficulty are likely to arise they will issue a certiorari, and either have the case tried before the Queen's Bench Division at Westminster, or send it down to be tried as a nisi prius record at the Assizes or in the city of London. When the case is so tried a new trial may be moved for on the ground of misdirection, that the verdict was against the evidence, or on other grounds on which new trials are moved for in civil cases. According to Chitty, the first instance of such a new trial was in the year 1655. One case only has occurred in which a new trial was granted for felony, and that case was afterwards disapproved of and not followed by the Judicial Committee of the Privy Council in R. v. Bertrand, L. R. 1 P. C. 520. It is very remarkable that in the argument upon R. v. Scaife, no notice was taken of the novelty of the proceeding." Stephen's Hist. Crim. Law, p. 310.

"It was contended on behalf of the prosecutor that, as two of the defendants had been acquitted, the record could not be sent down again to another trial without putting their guilt or innocence again into a state of inquiry, and that, inasmuch as defendants who have been acquitted in criminal cases cannot be tried a second time, the necessary consequence was that in this case we could not grant a new trial, even though we were clearly of opinion that the other two defendants had been improperly convicted. If such were the rule, it would bear extremely hard on particular persons accused; for then, however unjust the verdict against some of the defendants might appear to be, and though it should turn out beyond all contradiction that the verdict had been obtained by the grossest perjury, the guilt of those defendants must

STATE v. EAVES.

(Supreme Court of Georgia, 1901. 113 Ga. 749, 39 S. E. 318.)

SIMMONS, C. J.[4] * * * From the indictment it may be ascertained that the accused is charged with the violation of a certain penal statute. The accused contended that this act was no longer in force in Bartow county, having been superseded by another act. He sought to make the question in the lower court by requesting the judge to instruct the jury that a conviction could not be had under the indictment. In the motion for new trial complaint is made that the judge refused to so charge. The motion also sets up that the verdict is contrary to law, in that the indictment was based upon this inoperative statute. The question was not raised by demurrer to the indictment, the allegations of which were sufficiently established by the evidence. There was no motion to quash the indictment. The question was never properly raised. If the plaintiff in error was indicted under a law no longer in force, and the indictment is fatally defective, he does not want a new trial under that indictment. "In such a case the remedy is by general demurrer before a trial on the merits, or by motion in arrest after verdict." Roberts v. Keeler, 111 Ga. 186, 36 S. E. 617.

After going to trial upon the merits without objection to the indictment, the accused could not properly ask the direction of a verdict in his favor because of the insufficiency of the indictment. See Bray v. Railroad Co., 113 Ga. 308, 38 S. E. 849; Strouse v. Kelly, 113 Ga. 575, 38 S. E. 957. Nor can this point be made in a ground of a motion for a new trial complaining that the verdict is contrary to law and the evidence. See Phillips v. Railway Co., 112 Ga. 197, 37 S. E. 418; Roberts v. Keeler, supra. In the absence of objection to such an indictment, a conviction is authorized if the evidence sustains the allegations of the indictment as laid. Without regard, therefore, to the merits of the point sought to be raised, we must affirm the overruling of these grounds of the motion for new trial.

The verdict was authorized by the evidence. Judgment affirmed. Cross-bill dismissed. All the Justices concurring.[5]

necessarily stand on record, provided one defendant, perhaps included in the indictment for the very purpose, were acquitted. But I think that the rule was correctly stated by the counsel for the defendants that in granting new trials the court know no limitations (except in some excepted cases), but they will either grant or refuse a new trial as it will tend to the advancement of justice. In one class of offenses, indeed, those greater than misdemeanors, no new trial can be granted at all. But in misdemeanors there is no authority to shew that we cannot grant a new trial in order that the guilt or innocence of those who have been convicted may be again examined into." Kenyon, C. J., in Rex v. Mawbey, 6 Term R. 638 (1796).

[4] Part of this case is omitted.

[5] Accord: State v. Taylor, 37 La. Ann. 40 (1885).

BEPLEY v. STATE.

(Supreme Court of Indiana, 1853. 4 Ind. 264, 58 Am. Dec. 628.)

STUART, J.[6] This was a prosecution for a nuisance, under the seventeenth section of the act of March, 1853, regulating the retail of spirituous liquors. Trial by jury. Verdict and judgment for the state. * * *

There is a technical point, well settled in the books, but often overlooked in practice, which would restrain us from disturbing the verdict, if we were otherwise so disposed. The defendant moved first in arrest of judgment. According to the authorities he could not afterwards take the opinion of the court below on the sufficiency of the evidence, by a motion for a new trial, unless he had brought himself within some of the recognized exceptions, which he has not done. In the order in which they were made the one motion was fatal to the other. Rogers v. Maxwell, 4 Ind. 243; Mason v. Palmerton, 2 Ind. 117. * * *

PER CURIAM. The judgment is affirmed, with costs.[7]

[6] Part of this case is omitted.

[7] Accord: Rex v. White, 1 Burr. 333 (1757); Respublica v. Lacaze, 2 Dall. (Pa.) 118, 1 L. Ed. 313 (1791); McComas v. State, 11 Mo. 116 (1847).

"A new trial must be applied for within two days after the conviction; but, for good cause shown, the court, in cases of felony, may allow the application to be made at any time before the adjournment of the term at which the conviction was had. When the court adjourns before the expiration of two days from the conviction, the motion shall be made before the adjournment." Code Cr. Proc. Tex. 1895, art. 819; Pasch. Dig. art. 3136.

See, also, Lawson v. State, 71 Ind. 296 (1880); State v. Alphin, 81 N. C. 566 (1879); Ross v. State, 65 Ga. 127 (1880).

CHAPTER XIV

ARREST OF JUDGMENT

STATE v. SUTCLIFFE.

(Court of Appeals of South Carolina, 1850. 4 Strob. 372.)

The prisoner was convicted at the May term, 1849, and an appeal was taken in his behalf, which, after being docketed, was abandoned. On motion being made for judgment, the prisoner insisted that this court had no further jurisdiction in the matter, but that he must be remanded to await the judgment of the circuit court at its next term; and, secondly, he prayed the benefit of clergy.[1]

WARDLAW, J. * * * The prayer for benefit of clergy is then allowed, and the sentence for felony within the benefit will now be pronounced. As that has been, by our statutes, made fine and imprisonment, the case of the prisoner is just as if he had been indicted and convicted of a misdemeanor, except that, under the right of challenge, he has enjoyed privileges which one accused of a misdemeanor is not entitled to, and that for a second offense, he may hereafter lose the benefit now allowed to him.

RICHARDSON, EVANS, and FROST, JJ., concurred. WITHERS, J., absent, from indisposition.

The prayer for benefit of clergy was allowed, and the sentence for felony within the benefit was pronounced by the court.

STATE v. ARDEN.

(Court of General Sessions of South Carolina, 1795. 1 Bay, 487.)

The prisoner was indicted, together with one Campbell, for the murder of a Spanish seaman by the name of Jewets, and, at her particular request, was tried separately. Campbell was convicted of manslaughter, but the prisoner of murder. On the adjournment day of the sessions, when she was brought up for sentence, [2]

THE COURT (present BURKE, GRIMKE, WATIES, and BAY, Justices) unanimous that the motion in arrest of judgment should be overruled, as the prisoner had been indicted as a principal in both counts of the indictment, and the jury were to judge of the malicious intent, of the

[1] Part of this case is omitted.

[2] The arguments of counsel are omitted.

degrees of guilt in the parties, and to apply the evidence to the different counts as they thought proper.

The prisoner was then asked if she had anything to offer why sentence of death should not be pronounced against her. Upon which she pleaded pregnancy. Whereupon she was remanded to gaol, and the sheriff was directed to summon a jury of matrons, de ventre inspiciendo. The court then adjourned from day to day, till the inquisition was found. It was then returned by the sheriff into court, under the hands and seals of twelve matrons, in which they certified that they had examined the prisoner, and found that she was not pregnant. The prisoner was then brought up, and received sentence of death, and was afterwards executed pursuant to the sentence.[3]

STATE v. VANN.

(Supreme Court of North Carolina, 1881. 84 N. C. 722.)

Proceeding in a criminal action at Fall term, 1880, of Hertford superior court, before Schenck, J.

The prisoner being brought to the bar of the court for judgment pursuant to the decision of this court, reported in 82 N. C. 631, was asked if he had anything further to say than he had already said why sentence of death should not be pronounced upon him, and in answer thereto (through his counsel) suggested that the prisoner since his conviction had become insane, and in support thereof produced affidavits. Thereupon he demanded a jury trial of the question of his insanity, and asked for a continuance of the cause until the next term to prepare for trial. The court held that he was entitled to a jury to inquire into the fact, and, if it should be found favorable to the prisoner, the judgment must be suspended until his sanity was restored, and thereupon remanded him to prison and continued the case that the issue might be tried by a jury. From this ruling the solicitor for the state appealed.

SMITH, C. J.[4] * * * We concur entirely with the ruling of his honor that judgment must be suspended if the prisoner has become insane since his trial, and is still insane, until he recovers his reason, and that an issue to be submitted to the jury is the proper mode of ascertaining the truth of his allegation. The principle is thus laid down by Lord Hale: "If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed. * * * And if

[3] In England pregnancy is not a cause for arrest of judgment, but can only be pleaded in stay of execution. Chitty, Cr. Law, 759.

[4] Part of this case is omitted.

such person after his plea and before his trial become of nonsane memory, he shall not be tried; or if after his trial he become of nonsane memory, he shall not receive judgment; or if after judgment he become of nonsane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution." Hale, P. C. 34. The same language is used by Blackstone, and he adds: "For as is observed by Sir Edward Coke, the execution of an offender is for example, ut pœna ad paucos, metus ad omnes perveniat; but so it is not when a madman is executed, but should be a miserable spectacle, both against law and of extreme inhumanity and cruelty, and can be no example to others. But if there be any doubt whether the party be compos or not, this shall be tried by a jury." 4 Bl. Comm. 25. The same rule is laid down by the elementary writers and may be found in adjudged cases. Shel. on Lunacy, 467; 1 Bish. Cr. Law, § 487; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

But, for the reasons stated, the appeal was improvidently taken and must be dismissed.

PER CURIAM. Appeal dismissed.[5]

STATE v. CARVER.

(Supreme Judicial Court of Maine, 1862. 49 Me. 588, 77 Am. Dec. 275.)

DAVIS, J.[6] This was an indictment against Carver and Lunt, as principals, and also against Wilson and Clapp, as accessories before the fact. The first two, only, appear to have been arrested. Upon arraignment they pleaded guilty, and afterwards their counsel filed a motion in arrest of judgment. This was overruled by the court, and the case comes before us on exceptions.

We see no objection to the indictment itself which can avail the defendants, especially after the general plea of "guilty." The count against them as principals is sufficient in all respects; and, without intending to intimate that Wilson and Clapp may not be held upon the same indictment, we are clearly of the opinion that judgment may now be entered upon the pleas of the other defendants.

Another ground of the motion in arrest is that the grand jury, by whom the indictment was found, were "not legally drawn, and had no power to act in the premises." This allegation is one of fact, as well as of law. The facts do not necessarily appear of record, though in

[5] "We do not understand that any change in the condition of the prisoner was shown to have taken place since the impaneling of the jury. It was then, in effect, requiring the court to arrest or stay the judgment, for the same reason which had been unsuccessfully urged before the jury in defense of the criminal charge. We think the circuit court properly refused to entertain the motion." Goldthwaite, J., in State v. Brinyea, 5 Ala. 243 (1843).

[6] Part of this case is omitted.

this case the return upon one of the venires does not show that one of the grand jurors had no authority to act as such. State v. Clough, 49 Me. 573. But neither the venire, nor the return, constitutes any part of the record of this particular case. The proceedings of the departments of the government, of counties and towns, and officers of counties and towns, are all brought into requisition in order to constitute the court. Some of these are matters of record in the court, of which judicial notice will be taken, without other proof. But, if pleaded, they are to be pleaded as matters of fact, however proved. They are proceedings preliminary to the organization of the court, and not proceedings of the court after it is organized. A motion in arrest of judgment in any particular case does not necessarily bring them before us. They cannot be brought before us except by being pleaded specially; and they cannot be pleaded in such a motion with any more propriety than any other extrinsic facts.

A motion in arrest of judgment, in many of the states, is substantially a motion for a new trial, often for reasons entirely extrinsic of the record. But, at common law, "judgment can never be arrested but for that which appears upon the record itself." Peachy v. Harrison, 1 Ld. Raym. 232, 1 Salk. 77; Sutton v. Bishop, 4 Burr. 2283, 2287. The same rule prevails in this country. Such a motion can only be made "on account of some intrinsic defect, apparent on the face of the record, which would render the judgment in the case erroneous." Howe's Practice, 533; Bedell v. Stevens, 8 Fost. (N. H.) 118; Burnett v. Ballund, 2 Nott & McC. (S. C.) 435; State v. Bangor, 38 Me. 592, and cases there cited.

That the "record" referred to in these decisions is the record of the particular case under consideration was expressly held in the case last cited. It was alleged in the motion that another indictment for the same offense was found at the same term of the court. But it was decided that such a motion would not be entertained where proof was required to sustain it, though the proof was a matter of record in the same court.

A motion in arrest presents only the sufficiency of the indictment. State v. Nixon, 8 Vt. 70. It is equivalent to a demurrer, and can be sustained only when all that is alleged in the indictment may be true, and yet the person convicted not have committed any offense. State v. Hobbs, 39 Me. 212, and cases cited. And, even for defects which would be fatal to an indictment upon demurrer, if they are such as are aided by a verdict, judgment will not be arrested after conviction. Commonwealth v. Tuck, 20 Pick. (Mass.) 356.

Nor will judgment be arrested for anything that could have been pleaded in abatement.

By pleading generally to the indictment the defendant admits its genuineness, and waives all matters that should have been pleaded in abatement. The decisions to this point, both in England and in this

country, are numerous. But it is urged that such cases are to be distinguished from the one at bar, because here the defendants deny that there is any indictment, on the ground that there was no legal grand jury.

The question here presented has often been raised in this country, and it has uniformly been held that it is too late, after a verdict, to object to the competency of the grand jurors by whom the indictment was found, or to the mode of summoning or impaneling them. All such objections must be pleaded in abatement. The question is discussed at length in the case of People v. Robinson, 2 Parker, Cr. R. (N. Y.) 235, where many of the American cases are collected. The Attorney General, in the case before us, has cited other cases where the same doctrine is held. And we are not aware of any cases where it has been called in question.

The exceptions must be overruled.[7]

TENNEY, C. J., and RICE, MAY, GOODENOW, and KENT, JJ., concurred.

LACEFIELD v. STATE.

(Supreme Court of Arkansas, 1879. 34 Ark. 275, 36 Am. Rep. 8.)

HARRISON, J.[8] * * * The record states that the arraignment of the defendant was waived by him, but contains no entry of a plea to the indictment, though the trial was had, as if the plea of not guilty had been entered.

It was certainly very irregular to proceed to trial without a plea—there was no issue and nothing to try. It was an error for which the judgment should have been arrested. 1 Arch. Crim. Prac. and Plead. 178–31; 3 Whar. Crim. Law, § 3043; State v. Fort, 1 Car. L. Rep. 510; Cannon v. State, 5 Tex. App. 34; Bush v. State, 5 Tex. App. 64; State v. Matthews, 20 Mo. 55.

The judgment is reversed, and the cause remanded, with instructions to require the defendant to plead to the indictment, and to be proceeded in according to law.[9]

[7] Accord: Irregularity in drawing grand jury. Peter v. State, 11 Tex. 762 (1854). Misbehavior of judge in communicating with the jury. People v. Kelly, 94 N. Y. 526 (1884). Illegal admission of evidence. State v. Snow, 74 Me. 354 (1883). Misnomer in the indictment. State v. Thompson, Cheves (S. C.) 31 (1839). Lack of verification of information by oath. State v. Patton, 94 Mo. App. 32, 67 S. W. 970 (1902). Incompetence of juror. State v. Davis, 126 N. C. 1007, 35 S. E. 464 (1900).

"On a motion in arrest of judgment, * * * defects in the caption, or even the omission of the caption, cannot be noticed." Aldis, J., in State v. Thibeau, 30 Vt. 104 (1858).

[8] Part of this case is omitted.

[9] Accord: Douglass v. State, 3 Wis. 820 (1854). Where indictment charges no offense of which the trial court has jurisdiction (Truitt v. People, 88 Ill.

STATE v. LOHMDN.

(Court of Appeals of South Carolina, 1836. 3 Hill, 67.)

Before Mr. Justice BAY, at Charleston, October term, 1835.

PER CURIAM. No judgment can be given on the verdict, for it does not find the facts charged in the indictment of giving and delivering liquor to a slave named Sam, the property of Jacob F. Mintzing, but merely the "giving and delivering liquor to a slave." This is not a conviction of the offense charged.

Motion in arrest of judgment granted.[10]

518 [1878]), or fails to state the county in which the crime was committed (Searcy v. State, 4 Tex. 450 [1849]).

Contra: People v. Osterhaut, 34 Hun (N. Y.) 260 (1884). Under statute. State v. Cassady, 12 Kan. 550 (1874).

See, also, Ford v. State, 112 Ind. 373, 14 N. E. 241 (1887).

"It is settled by the decisions in this state that for mere defects or uncertainties in criminal pleading a motion in arrest will not be sustained, although such defects or uncertainties might be fatal on a motion to quash." Monks, J., in Campton v. State, 140 Ind. 444, 39 N. E. 916 (1895).

Statutes exist very generally limiting the scope of the motion in arrest of judgment. See Young v. People, 193 Ill. 236, 61 N. E. 1104 (1901); Terrell v. State, 41 Tex. 464 (1874); Commonwealth v. Brown, 150 Mass. 334, 23 N. E. 98 (1890); State v. Goldman, 65 N. J. Law, 394, 47 Atl. 641 (1900).

[10] Accord: Manigault v. State, 53 Ga. 113 (1874). See, also, Slaughter v. State, 24 Tex. 410 (1859); State v. McCormick, 84 Me. 566, 24 Atl. 938 (1892). Cf. State v. Snow, 74 Me. 354 (1883).

CHAPTER XV

JUDGMENT, SENTENCE AND EXECUTION

If the defendant be in custody, or the crime be capital, he will of course be remanded to prison in the interval between conviction and sentence, if any be allowed to transpire. But if the cause of prosecution be a mere misdemeanor, and he be found guilty in his absence, * * * a capias is awarded and issued to bring him in to receive his judgment, and if he absconds he may be prosecuted, even to outlawry. In case of a conviction for a misdemeanor, if the defendant be present, he will of course be committed during the interval, unless the prosecutor will consent to his liberation on his recognizance to appear and receive judgment.

1 Chit. Cr. Law, 664.

The sentence in capital cases is usually given immediately after conviction, but the court may adjourn to another day and then give judgment.

Id. 699.

McCUE v. COMMONWEALTH.

(Supreme Court of Pennsylvania, 1875. 78 Pa. 185, 21 Am. Rep. 7.)

Error to the court of oyer and terminer of Lycoming county; of January term, 1875, No. 51.

On the 25th of November, 1874, a true bill was found against Barney McCue, for the murder of John Dieter. On the 27th of November the defendant, being arraigned, pleaded "Not guilty," and the same day the trial commenced, before Gamble, P. J., and his associates, judges of the court of oyer and terminer of Lycoming county. * * *

On the 1st of December the jury found the defendant "guilty of murder in the first degree."

The record then has this entry:

"And now, December 6, 1874, prisoner, Barney McCue, brought into open court, and the sentence of the court is: That you, Barney McCue, prisoner at the bar, be taken from hence to the jail of the county of Lycoming, from whence you came, and from thence to the place of execution within the walls of said jail, and that you be there hanged." * * *

Chief Justice AGNEW delivered the opinion of the court.[1] * * *

But there is one error for which the sentence of the court must be reversed. It does not appear from the record that the prisoner was

[1] Part of this case is omitted.

asked, before sentence, why sentence of death should not be pronounced upon him. This is a fatal error, and affects the merits of the case. It is necessary to ask the prisoner this, that he may have an opportunity, before the penalty of death be visited upon him, to plead in bar of the sentence any matter sufficient to prevent its execution. He may have found out some good reason why the trial was not legal, or he may plead a pardon, or supervening insanity. The question, and the answer that he hath nothing to say other than that which he hath before said, or this in substance, must appear in the record before the sentence can be pronounced. Prine v. Commonwealth, 18 Pa. 104; Dougherty v. Commonwealth, 69 Pa. 291. In this case the question may have been asked in fact; but, as it does not appear in the record, and is a matter of substance, we must treat it as not having been done. In all high felonies, and especially in cases of murder, the presiding judge should see that the record is made up properly, before the term is over.

The sentence will be reversed, in order that the case may be sent back, and an opportunity afforded to the prisoner to plead in bar of it; but this error will not reverse the trial and conviction. Jewell v. Commonwealth, 22 Pa. 94, 102. * * *[2]

REX v. CATTERALL.

(Court of King's Bench, 1731. Fitzgibbons, 266.)

Upon the Return of a Habeas Corpus, the Commitment was by Justices of the Peace (authorized for that Purpose by Act of Parliament) for refusing to account for a Toll by him received, and until he do account, and pay what shall be due to the Proprietors of the said Toll: Et PER CUR', The Commitment is illegal, for no certain Sum is thereby appointed to be paid, and then the Defendant may remain in Prison for Life: It was then moved to amend the Commitment: Sed PER CUR', That cannot be after the Return filed; and the Defendant was discharged.[3]

[2] Accord: In treason. Rex v. Speke, 3 Salk. 358 (1691). In capital cases, generally. State v. Ikenor, 107 La. 480, 32 South. 74 (1902); Territory v. Herrera, 11 N. M. 129, 66 Pac. 523 (1901); Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377 (1891). Contra: Gannon v. People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147 (1889); Warner v. State, 56 N. J. Law, 686, 29 Atl. 505, 44 Am. St. Rep. 415 (1894). In some jurisdictions the allocutus is necessary, even in felonies less than capital. Crocker v. State, 47 Ala. 53 (1872); People v. Jung, 70 Cal. 469, 11 Pac. 755 (1886).

[3] Compare Brownbridge v. People, 38 Mich. 751 (1878); People v. Degnen, 54 Barb. (N. Y.) 105 (1869); People v. Hughes, 29 Cal. 257 (1865).

KIDD v. TERRITORY.

(Supreme Court of Oklahoma, 1900. 9 Okl. 450, 60 Pac. 114.)

IRWIN, J.[4] In this case there are 19 assignments of error, but we think it only necessary to refer to one. That is the error assigned that the court, in pronouncing sentence, found the defendant guilty of a different and higher degree of offense than that authorized by the verdict of the jury. A reference to the verdict of the jury will be found in the record. The verdict reads as follows: "We, the jury duly selected, impaneled, and sworn in the above-entitled cause, find the defendant guilty of assault and battery. F. L. Boling, Foreman."

A reference to the sentence of the court will show the following: "October 22, 1898. 12th Judicial Day. Criminal Cause #711. Territory of Oklahoma v. James W. Kidd. Judgment and Sentence. Comes now defendant into open court for judgment and sentence on the verdict of guilty heretofore rendered in said cause; and now, defendant giving no good reason why the judgment and sentence of the court should not at this time be pronounced upon him, on the verdict herein, the court finds that the said defendant is, on the verdict herein, guilty of assault with intent to kill. It is therefore considered, ordered, and adjudged that the defendant, James W. Kidd, be, and hereby is, fined in the sum of one hundred ($100.00) dollars, and the costs of this action, taxed at $———, and that he be imprisoned in the county jail for a period of thirty days. And now the court informs defendant of his right of appeal, and bail pending said appeal is fixed at $500, and ten days given to take appeal, 60 days to prepare and serve case-made, ten days to suggest amendments thereto, to be signed and settled on five days' notice. To the rendition of which said judgment and sentence the defendant excepts at the time."

By this record it clearly appears that while the jury have found the defendant guilty of simple assault and battery, which under our statute is a misdemeanor, the court has found the defendant guilty of a felony, to wit, an assault with intent to kill, which, we have no doubt, is clearly reversible error. While the punishment inflicted is the maximum punishment for assault and battery, it is also the minimum punishment for the crime of assault with intent to kill, as provided by our statute. Now, it seems to us that the law never intended that the court should pass sentence and judgment upon a defendant, finding him guilty of a greater or more serious offense than that of which the jury by their verdict had convicted him. In this case, if allowed to stand, the record would show that the jury had found the defendant guilty of a misdemeanor, and the court, passing sentence upon that verdict, had increased the degree of the offense to make it a felony.

This we think is error, for which the judgment is reversed, and the

[4] Part of this case is omitted.

cause remanded for sentence in accordance with the verdict of the jury, and costs assessed to Kingfisher county. All of the justices concurring.[5]

BURRELL v. STATE.

(Supreme Court of Nebraska, 1889. 25 Neb. 581, 41 N. W. 399.)

COBB, J.[6] * * * The jury found the defendant guilty on 16 of the 17 counts of the indictment, one of which was for selling to a minor, for which the law fixes the punishment at a fine of $25. The sentence should have been upon the theory that the verdict is sustained by the evidence; that the defendant pay a fine of so much for the offense for which he stands convicted upon the first count of the indictment, and so on; but, instead thereof, there is one solid fine assessed against the defendant, for the sum of $1,525.

We have seen that there is no evidence to sustain the judgment as to four of the counts. Had a separate fine been assessed as to each count upon which there was a finding by the jury, only those upon the counts where the finding is unsustained by evidence would be reversed; but, as the fine and judgment are in solido, it must be said that the judgment is unsustained by the evidence, and it must be reversed.

The judgment of the district court is reversed, and the cause remanded for further proceedings. The other judges concur.[7]

Ex parte BURDEN.

(Supreme Court of Mississippi, 1907. 92 Miss. 14, 45 South 1, 131 Am. St. Rep. 511.)

WHITFIELD, C. J.[8] The verdict in this case was in the following words: "We, the jury, find the defendant guilty of assault and battery with intent to commit manslaughter." Under the case of Traube v. State, 56 Miss. 153, this has been determined to be a mere conviction of assault and battery; the words "with intent to commit manslaughter" being mere surplusage. We have, therefore, a conviction for a misdemeanor. The learned circuit judge, misinterpreting this verdict, held it to be a conviction for a felony, and sentenced the

[5] Accord: Where the court imposed a lighter sentence than authorized by the verdict. Cole v. People, 84 Ill. 216 (1876).

[6] Part of the opinion only is reprinted.

[7] Cf. Stephens v. State, 53 N. J. Law, 245, 21 Atl. 1038 (1891); Lefforge v. State, 129 Ind. 551, 29 N. E. 34 (1891); People v. Carter, 48 Hun (N. Y.) 165 (1888).

[8] Part of this case is omitted.

defendant to six years in the penitentiary. This sentence he had no power or jurisdiction to impose. The distinction, abundantly established by authority, is between a sentence which is merely excessive or erroneous, regard being had to the particular offense, and a sentence which is absolutely void. In the former case the writ of habeas corpus cannot be availed of, but the party must appeal; else the writ of habeas corpus would be made to serve the office intended exclusively for an appeal. * * *

In the case of a judgment or sentence which is merely excessive, it seems to be well settled that, "if the court was one of general jurisdiction, such judgment or sentence is not void ab initio because of the excess, but that it is good so far as the power of the court extends, and is invalid only as to the excess, and therefore that a person in custody under such a sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as it was within the power of the court to impose. This condition exists whenever the punishment imposed is of the nature or kind prescribed by law and merely exceeds the quantity authorized, as where the offender is sentenced to a longer term of imprisonment than is prescribed for the particular offense," etc. It will be especially noted that both Cyc. and A. & E. Ency. of Law declare it to be the modern rule, according to the latest and best-considered cases, that, although the court may have jurisdiction over the subject-matter and over the person, it is without jurisdiction to impose a sentence not appropriate to the kind and nature of the offense. * * *

Wherever the sentence pronounced by the circuit judge is merely excessive, or erroneous, or irregular, the writ of habeas corpus has no place, but the defendant must appeal; but wherever the sentence imposed by the circuit judge for the particular offense of which the defendant has been found guilty by the jury is void for want of power to pronounce that particular sentence, such sentence is absolutely void, and the defendant may resort to the writ of habeas corpus to release him from confinement in pursuance of such illegal sentence.

Here we have the case of a man convicted of a misdemeanor and under sentence as for a felony. Most manifestly the sentence is void absolutely, as one which the court was without power under the law to pronounce at all. It is not correct to say that, if the circuit judge interpreted this verdict to be a verdict of guilty of a felony, he was under the duty to sentence as for a felony. Whether the defendant was convicted of a misdemeanor or a felony as a matter of fact is the test as to the sentence to be imposed; not what interpretation, right or wrong, the circuit judge may have put on the verdict. The question is, what was the defendant convicted of by this verdict? and the answer is plain, "Of simple assault and battery," and that is a mere misdemeanor. How, then, could the circuit judge impose the penalty of six years' imprisonment in the penitentiary on a defendant convicted of mere assault and battery? It is manifest that his judgment was absolutely void.

The argument that habeas corpus does not lie to correct a merely excessive sentence is sound enough; but the sentence must always be one proper for a misdemeanor where the conviction is of a misdemeanor, and one proper for felony where the conviction is of a felony, else we would introduce interminable confusion into the law. If in this case, for example, the circuit judge, treating this judgment, as he should have treated it, as a conviction of simple assault and battery, had imposed an excessive sentence as for a misdemeanor, we would have had the case of a merely excessive or irregular or erroneous sentence; but, when he undertook to impose upon the defendant a felony sentence for a conviction for misdemeanor, it becomes perfectly clear that he imposed a sentence which he was without power or jurisdiction to impose. The one would have been a mere irregular exercise of power; the other the exercise of a power he was wholly without, since in no possible case could he have imposed a felony sentence for a mere misdemeanor.

One other observation is due to be made, however, in this case, and that is that, since this verdict is not a nullity, but was a good verdict for assault and battery, the relator should not be discharged, but should be remanded to the circuit court for proper sentence as for assault and battery. See 21 Cyc. p. 306, par. 15, where it is said, citing authorities: "The court may also have jurisdiction to commit a party on one ground, but not on another, and may nevertheless commit him on both grounds; and in such case the prisoner ought not to be discharged so long as he is properly imprisoned under the valid portion of the commitment."

The decree is affirmed.[9]

FULTS v. STATE.

(Supreme Court of Tennessee, 1854. 2 Sneed, 232.)

TOTTEN, J.[10] At January term, 1854, of the circuit court of Grundy, David Fults, with others, was convicted of an affray. He was sentenced to a fine of $10 and two days' imprisonment. The fine and costs were secured, and there appears of record the following entry:

"On motion of defendant, David Fults, and for reasons appearing to the satisfaction of the court by admission of the Attorney General and the evidence in the case, he is permitted to enter into recognizance to appear at the next term of this court and then undergo the imprisonment adjudged against him, and abide by and perform the sentence of the court."

The defendant gave bail, and at the next term made his appearance before the court. It was thereon ordered that the defendant be im-

[9] Mayes, J., dissented.

[10] Part of this case is omitted.

prisoned in accordance with the judgment at the former term, and the defendant appealed in error to this court.

We see nothing irregular in this proceeding to which the defendant can except. There are many cases, no doubt, where it is necessary, and proper, to suspend the execution of the final judgment. For instance, where the prisoner has become non compos between the judgment and the award of execution; or, in order to give room to apply to the executive for a reprieve or pardon, or in special cases, where the necessity and propriety of such course are rendered evident to the mind of the court. Allen v. State, Mart. & Y. 297; 4 Bl. Com. 395.

In Allen's Case it was considered that a right to petition the executive for a pardon was a constitutional right, and as the prisoner was convicted of manslaughter, and sentenced to be branded in the hand, under the law then in force, time was allowed him until the next term to petition for a pardon. He was also permitted to give bail, the court remarking: "In common cases, where the party can give bail reasonably, to secure his appearance, that he may be forthcoming and subject to the sentence of the law, is all that the law requires."

Now it is true that the order does not state for what cause the respite was granted. It were better, no doubt, that the cause be stated, that it may appear to be such as the law will recognize. We are bound, however, to presume from the silence of the record in this respect, that the respite was granted on sufficient cause; but, if it were not, it is clear that the objection is one not to be made by the defendant who takes the benefit of it.

The judgment will be affirmed.[11]

[11] But see In re Webb, 89 Wis. 354, 62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846 (1895); In re Markuson, 5 N. D. 180, 64 N. W. 939 (1895).

CHAPTER XVI

APPEAL, WRIT OF ERROR, AND CERTIORARI

REX v. INHABITANTS OF SETON.

(Court of King's Bench, 1797. 7 Term Report, 373.)

The defendants, the inhabitants of the township of Seton, were indicted for not repairing a road; and after verdict and judgment at the quarter sessions a certiorari was served to remove the record here.

Chambre on a former day in this term moved to quash the certiorari quia improvidè emanavit, observing that the party who now wished to remove the record could only do so by writ of error.

Law now showed cause against that rule, and insisted that all the proceedings below were stayed by the issuing of the certiorari, which was before verdict in this case. In 2 Ld. Raym. 1305, Powell, J., said: "A writ of certiorari removes any order or conviction, though they be made or taken after the teste of the writ, so they be taken before the return." And in that case the inquisition taken after the teste but before the return of the certiorari was quashed by this court for defects appearing on the inquisition.

Lord KENYON, C. J. In the case of summary proceedings, orders, and convictions before magistrates, the proceedings may be removed by certiorari after judgment, because such proceedings can only be removed by certiorari; but where a judgment has been given on an indictment, the record must be removed by writ of error. If any fraud or misconduct had been imputed to the magistrates in proceeding notwithstanding the issuing of the certiorari, that might have been a ground for a criminal proceeding against them; and I believe there are instances in which a criminal information has been granted against magistrates acting in sessions. In this case if the party, who sued out the certiorari, wish to object to the proceedings, he must remove the record by writ of error; but this writ must be quashed.

PER CURIAM. Rule absolute.[1]

LONG'S CASE.

(Court of Queen's Bench, 1595. Cro. Eliz. 489.)

William Long was indicted at Norwich, within the county of the city of Norwich, of the felonious stealing of a piece of linen cloth, and was thereof arraigned, and pleaded not guilty, and was found guilty, and prayed his clergy, and was burnt in the hand. Upon in-

1 Accord: Hertel v. People, 74 Ill. App. 304 (1897). See, also, Thayer v. Commonwealth, 12 Metc. (Mass.) 9 (1846).

formation to the court that this indicting of him was by practice, and he found guilty upon small evidence, he obtained a certiorari to remove the whole record into the crown office; which being removed, there were divers exceptions to the indictment to discharge the same. For it was moved that it might well have been discharged by exception, and there needed not any writ of error to avoid it; and he could not have a writ of error, as the case is, because he was a clerk convicted only, and not attainted; for when he prayed his clergy, which was allowed him, there never was any judgment afterwards given. And of that opinion was the whole court.[2]

TAFF v. STATE.

(Supreme Court of Errors of Connecticut, 1872. 39 Conn. 82.)

SEYMOUR, J. The plaintiff in error was duly convicted of violating the first section of "the act to prevent and remove nuisances." The conviction was upon the presentment of an informing officer, and section 13 of the act provides that every person so convicted shall be fined not less than $5 nor more than $50. It appears by the record that the fine actually imposed by the court is $4, and because the fine is thus less than the defendant was entitled to, he brings this writ of error to reverse the judgment.

Notwithstanding many old cases to the contrary, the settled law in Connecticut is that no party can set aside a judgment by writ of error, unless he is aggrieved by the judgment of which he complains. This sound and just doctrine is so fully and ably vindicated by the late Chief Justice Williams in the case of Alling v. Shelton, 16 Conn. 436, as to require no further discussion. The only question before us is how far that doctrine applies to the present case.

We think it clear that the sentence to pay a fine of $4 is not warranted by the statute. The thirteenth section is as peremptory in its language in forbidding a fine of less than $5 as it is in forbidding one of more than $50. If, then, we decide that the defendant shall pay the $4 fine, we decide that he must pay a fine which the court below had no authority to inflict, and which the language of the statute forbids to be inflicted.

Is the defendant aggrieved by this sentence? If there is nothing more in the case, he certainly is aggrieved by an order to pay an unwarrantable fine. Can we, then, use the defendant's liability to the higher penalty as a ground for supporting the lower, but unwarranted, penalty, which appears by the record to have been inflicted? We think we cannot. It is true that the defendant is not as much damaged by the sentence actually given as he would have been had the legal sen-

[2] See, also, State v. Daugherty, 39 W. Va. 470, 19 S. E. 872 (1894); People v. Walker (Cal.) 61 Pac. 809 (1900). Cf. State v. Morgan, 33 Md. 44 (1870).

tence been pronounced. But the legal sentence has not been pronounced, and we have no power to pronounce it.

If the plaintiff in error succeeds, he relieves himself from an unlawful sentence, and does not thereby ipso facto subject himself to the lawful penalty. Whether he thereby puts himself in the way of being subjected to the lawful penalty upon further proceedings we have no occasion to decide. We think, therefore, that the judgment, so far as the fine is concerned, must be reversed.

A question then arises what effect has such reversal upon the other parts of the judgment. The statute provides that the court before whom the conviction is had shall order the defendant to remove such nuisance within 30 days. This order was made, and a further order that the defendant pay a bill of costs. The case of Matter of Sweatman, 1 Cow. (N. Y.) 144, is full to the point that a judgment may be erroneous in part, and valid as to the residue. That case was well considered and elaborately discussed, and is cited by us with approbation in the recent case of State v. James, 37 Conn. 355. The judgment there was a full and complete judgment according to law, with the addition of something not warranted by law, and the maxim, "Utile per inutile non vitiatur," was applicable, and applied to the case.

But the argument here for the plaintiff in error is that, the sentence to pay the fine being illegal and reversed, the judgment which remains is not a full and complete judgment, and ought for that cause to be set aside. But it is difficult to see how the plaintiff in error can be aggrieved by this imperfection, unless, indeed, it be so imperfect as for that cause to be invalid. If the statute was such that the court were prohibited from rendering the judgment to remove the nuisance and pay the cost, without also imposing a fine, then indeed, perhaps the plaintiff in error might be aggrieved, but the statute makes no such prohibition. On the contrary, the statute expressly requires the court to order the removal of the nuisance. This order the court below made, and we cannot say the order is erroneous, merely because the court failed to do its duty in respect to the fine. The case of Alling v. Shelton, is full to this point.

The judgment, therefore, of the superior court is reversed as to the fine, but in all respects except as to the fine it is affirmed. In this opinion the other Judges concurred.[3]

[3] Accord: State v. Kennedy, 88 Mo. 341 (1885); Montgomery v. State, 7 Ohio St. 107 (1857).

Where two persons are jointly indicted, the court may, on writ of error, affirm the judgment as to one defendant and reverse as to the other. Fletcher v. People, 52 Ill. 395 (1869).

"The Attorney General admits that through inadvertence a sentence was imposed on the prisoner, which the law does not authorize, and concedes, upon the authority of Watkins v. State, 14 Md. 412, this judgment must be reversed. That is undoubtedly so, and the only other question we can now decide is whether upon such reversal this court has the power to impose the proper sentence, or to remand the case to the court of original

JOAN v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts, Bristol, 1883. 136 Mass. 162.)

BY THE COURT.[4] The assignments of error aver that the building which the plaintiff in error was convicted of burning was not a dwelling house, as alleged in the indictment, and that it was not the property of the person alleged in the indictment to be the owner. Both of these facts were put in issue and were tried in the superior court. The plaintiff in error cannot retry them upon a writ of error. No error in the judgment is shown, and the evidence offered was properly rejected.

Exceptions overruled.

HORNBERGER v. STATE.

(Supreme Court of Indiana, 1854. 5 Ind. 300.)

Appeal from the Dearborn court of common pleas.

STUART, J. Information against Hornberger for retailing, etc. Trial by the court, fine $10, and judgment accordingly.

Hornberger appeals; but on what grounds does not very clearly appear.

jurisdiction for that purpose. In the absence of legislation conferring that authority upon this court, it is clear it has no power to do either of these things. In Watkins v. State, where the judgment was reversed for a similar defect, the court say: 'The effect of the reversal for error in the judgment itself is properly stated by the counsel for the plaintiff in error in his argument. It defeats all former proceedings in the cause. This will abundantly appear by reference to the following authorities cited by him on this point: 1 Chitty's Cr. Law, 755; 4 Bl. Com. 393; Hawkins, Bk. 2, c. 50, § 19.' In addition to these authorities we refer to several more recent decisions of the English and Irish courts upon the subject, viz., Rex v. Ellis, 5 Barn. & C. 395, King v. Bourne, 7 Adol. & E. 58, Silversides v. The Queen, 2 Gale & D. 617, and Holland v. The Queen, 2 Jebb & S. 357. In each of these, and especially in the first two, it was, upon full review of all previous decisions, denied that a court of error had any power, in a case like this, either to remand the record to the court below for the proper judgment, or itself to pronounce such judgment as the law authorized, and Rex v. Kenworthy, 1 Barn. & C. 711, which was cited in support of the power to remand, is there shown to be a case in which no judgment had in fact been given, and it was therefore remitted back to the sessions in order that a judgment might be rendered." Miller, J., in McDonald v. State, 45 Md. 90 (1876).

[4] Part of this case is omitted.

"It is only legal errors which can be considered on writs of error—errors appearing in the record, or by exceptions taken upon the trial. * * * In People v. Thompson, 41 N. Y. 1, the prisoner was convicted of manslaughter in the second degree, and, although it appeared by the evidence that the prisoner was not guilty of that offense, the court held that, as there was no exception, it could not reverse the judgment." Andrews, J., in Gaffney v. People, 50 N. Y. 425 (1872).

Accord: Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966 (1891).

There was no exception taken to any ruling of the court in the progress of the trial. 2 Rev. St. 377.

No motion was made for a new trial, nor in arrest of judgment. 2 Rev. St. 380.

There is none of the evidence in the record; nor does it appear that he even interposed a motion to quash the information. 2 Rev. St. 368.

At the common law there were some defects which might be taken advantage of, either by motion to quash, or by motion in arrest, or upon error. But now the writ of error is abolished. 2 Rev. St. 158; Id. 381. The motion to quash, motion for a new trial, and motion in arrest of judgment yet remain, curtailed and modified by statute. 2 Rev. St., supra. In their very nature, each of these motions, with their several incidents, are to be addressed to the court below. But the statute does not leave this matter in doubt. It is minutely provided when, how, and in what order they are to be made. 2 Rev. St., supra. If any ruling of the court in the premises is deemed incorrect, the statute further points out the time and mode of exception and appeal. 2 Rev. St. 377, 381.

These are the established modes of raising points in the record for the consideration of this court. A bare appeal cannot of itself avail the party taking it, unless the preliminary steps to raise questions in the record have been adopted. It is not the errors pointed out in argument that we are to review. Nor, in general, even the errors apparent in the record. But it is the errors to which the aggrieved party has excepted at the time, in the manner pointed out in the foregoing statutes.

Whether there may not be some exceptions to this rule is not now before us to inquire, and no opinion is intimated.

It is sufficient in this case that Hornberger does not appear as objecting to anything. There is consequently nothing presented in the record for us to review. We are bound to presume that all things were done correctly in the common pleas, unless the contrary is made to appear.

The whole spirit of the new Code is to hold every failure to assert a legal right at the proper time to be a waiver of that right. It gives still greater consequence to the legal maxim that "the law favors the vigilant." To this end it is specific as to the objections available in criminal cases; and it is specific as to when, where, and in what manner they should be made. The object seems to have been that cases should not be reversed in this court on questions never raised or agitated in the court below.

If, therefore, parties would have decisions made against them reversed, they must take the proper steps, at the proper time; and the record must show that fact. 2 Rev. St. 377, 380. It is too late to raise such questions for the first time in this court, by way of argument.

This doctrine does not conflict with Divine v. State, 4 Ind. 240; for there the defendant interposed a motion to quash.

Nor does it conflict with Hare v. State, 4 Ind. 241; for there the defective allegation was aided by the evidence.

Nor does it conflict with Wood v. State (at the present term) 5 Ind. 433; for that case is governed by the law in force prior to the taking effect of the Revised Statutes.

There being no question raised in the record, and nothing for us to decide, the judgment of the common pleas must stand.

PER CURIAM. The judgment is affirmed, with costs.[5]

UNITED STATES v. SANGES et al.

(Supreme Court of the United States, 1892. 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445.)

In Error to the Circuit Court of the United States for the Northern District of Georgia.

Indictment of George Sanges, Dennis Alexander, Isaac Smith, and Charles Porter for murder. * * * The defendants demurred to the indictment. * * *

On October 5, 1891, the Circuit Court, held by Mr. Justice Lamar and Judge Newman, adjudged that the demurrer was well founded in law, and that it be sustained, and the indictment quashed. 48 Fed. 78.

This writ of error was thereupon sued out by the United States, and was allowed by the presiding justice. The defendants in error moved to dismiss the writ of error for want of jurisdiction.

Mr. Justice GRAY, delivered the opinion of the court.[6] The jurisdiction of this court is invoked by the United States under that provision of the judiciary act of 1891 by which "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court," "in any case that involves the construction or application of the Constitution of the United States." Act March 3, 1891, c. 517, § 5, 26 Stat. p. 827 (U. S. Comp. St. 1901, p. 549).

But the question which lies at the very threshold is whether this provision has conferred upon the United States the right to sue out a writ of error in any criminal case.

This statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 545, 9 L. Ed. 773; Rice v. Railroad Co., 1 Black,

[5] Accord: State v. Lawrence, 81 N. C. 522 (1879).

[6] Part of the opinion is omitted.

358, 374, 375, 17 L. Ed. 147; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; Ex parte Wilson, 114 U. S. 417, 422, 5 Sup. Ct. 935, 29 L. Ed. 89; 1 Kent, Comm. 336. As aids, therefore, in its interpretation, we naturally turn to the decisions in England and in the several states of the Union, whose laws have the same source.

The law of England on this matter is not wholly free from doubt. But the theory that at common law the king could have a writ of error in a criminal case after judgment for the defendant has little support beyond sayings of Lord Coke and Lord Hale, seeming to imply, but by no means affirming, it, two attempts in the House of Lords, near the end of the seventeenth century, to reverse a reversal of an attainder, and an Irish case and two or three English cases, decided more than 60 years after the Declaration of Independence, in none of which does the question of the right of the crown in this respect appear to have been suggested by counsel or considered by the court. 3 Inst. 214; 2 Hale, P. C. 247, 248, 394, 395; Rex v. Walcott, Show. Parl. Cas. 127; Rex v. Tucker, Show. Parl. Cas. 186, 1 Ld. Raym. 1; Regina v. Houston (1841) 2 Craw. & D. 191; The Queen v. Millis (1843) 10 Clark & F. 534; The Queen v. Wilson (1844) 6 Q. B. 620; The Queen v. Chadwick (1847) 11 Q. B. 173, 205. And from the time of Lord Hale to that of Chadwick's Case, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case, and that a judgment in his favor is final and conclusive. See 2 Hawk. P. C. c. 47, § 12; Id. c. 50, § 10 et seq.; Bac. Abr. "Trial," L, 9, "Error," B; 1 Chit. Crim. Law, 657, 747; Starkie, Crim. Pl. (2d Ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. Ed.) 177, 199.

But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.

In a few states decisions denying a writ of error to the state after judgment for the defendant on a verdict of acquittal have proceeded upon the ground that to grant it would be to put him twice in jeopardy, in violation of a constitutional provision. See State v. Anderson (1844) 3 Smedes & M. (Miss.) 751; State v. Hand (1845) 6 Ark. 169, 42 Am. Dec. 689; State v. Burris (1848) 3 Tex. 118; People v. Webb (1869) 38 Cal. 467; People v. Swift (1886) 59 Mich. 529, 541, 26 N. W. 694.

But the courts of many states, including some of great authority, have denied, upon broader grounds, the right of the state to bring a

writ of error in any criminal case whatever, even when the discharge of the defendant was upon the decision of an issue of law by the court, as on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment.

The Supreme Court of Iowa, in 1856, ordered a writ of error sued out by the state, after the defendant had been acquitted by a jury, to be dismissed, not because to order a new trial would be against article 1, § 12, of the Constitution of the state, declaring that "no person shall after acquittal be tried for the same offense" (for the court expressly waived a decision of that question), but only because of "there being no law to authorize a writ of error on the part of the state in a criminal case." State v. Johnson, 2 Iowa, 549.

The Supreme Court of Wisconsin, in 1864, held that a writ of error did not lie in behalf of the state to reverse a judgment in favor of the defendant upon a demurrer to his plea to an indictment. State v. Kemp, 17 Wis. 669. The Supreme Court of Missouri, in 1877, made a similar decision, overruling earlier cases in the same court. State v. Copeland, 65 Mo. 497. And the Supreme Court of Florida, in 1881, held that the state was not entitled to a writ of error to reverse a judgment quashing an indictment, and discharging the accused. State v. Burns, 18 Fla. 185.

In those states in which the government in the absence of any statute expressly giving it the right, has been allowed to bring error, or appeal in the nature of error, after judgment for the defendant on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment, the question appears to have become settled by early practice before it was contested. * * *

In many of the states, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error, in criminal cases, has been given to the state by positive statute. But the decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the state, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government.

[The court here discussed the acts of Congress and continued:]

In none of the provisions of this act,[7] defining the appellate juris-

[7] Judiciary Act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 547).

diction, either of this court or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States.

Writ of error dismissed for want of jurisdiction.

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